Supreme Court, U. S.
FILED
JUN 26 1980
MICHAEL RODAK, JR., CLER

APPENDIX

In the Supreme Court of the United States

October Term, 1979
No. 79-1176

CITY OF MEMPHIS, ET AL.,
Petitioners,

vs.

N. T. GREENE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Certiorari Filed January 30, 1980
Certiorari Granted May 12, 1980

TABLE OF CONTENTS

Relevant Docket Entries 1
Complaint filed April 1, 1974 3
Amended Complaint filed August 22, 1974 8
Order on Motions to Dismiss filed October 4, 1974 28
Opinion of Court of Appeals decided May 13, 1976 36
Answer to Defendants filed June 7, 1976 44
Motion to Intervene as Plaintiff filed March 29, 1977 46
Motion for Leave to File Amended Complaint filed March 29, 1977 47
Amended Complaint or Plaintiff's Complaint for Intervention filed March 29, 1977 48
Order Granting Motion to Intervene as Plaintiffs filed April 11, 1977 53
Joint Motion of Plaintiff-Intervenors and Plaintiffs N. T. Greene, et al. To Amend Complaint in Intervention and Second Amended Complaint filed May 24, 1977 55
Answer to Plaintiffs' Complaint for Intervention as Amended filed September 27, 1977 57
Order Granting Motion to Amend and Certification of Class Action filed October 3, 1977 67
Answers to Plaintiffs' First Interrogatories filed December 16, 1977 68
Motion for Leave to File a Fourth Amended Complaint filed February 2, 1978 76
Defendants' Response to Plaintiffs' Motion for Leave to File Fourth Amended Complaint filed February 7, 1978 77
Supplemental Answers to Plaintiffs' First Interrogatories filed February 7, 1978 78

Pre-Trial Order filed February 9, 1978 81
Plaintiff/Intervenors' Post Trial Memorandum filed February 27, 1978 93
Testimony of [Harrell] C. Moore 111
Testimony of Marvin Feit 113
Testimony of Sarah Terry 114
Testimony of Robert Miller 116
Closing Arguments and Comments of Court 123
Trial Exhibits 1 & 2 126
Trial Exhibit 3 128
Trial Exhibit 4 130
Trial Exhibit 13 132
Memorandum Decision in Favor of Defendants filed June 21, 1978 146
Opinion of Court of Appeals filed November 1, 1979 165
Order Denying Petition for Rehearing filed December 11, 1979 198
Order Staying Mandate filed January 18, 1980 Case No. 78-1527 199
Order Staying Mandate filed January 18, 1980 Case No. 78-1528 200

RELEVANT DOCKET ENTRIES

4/1/74	Filed Complaint
5/17/74	Motion to Dismiss
8/22/74	Filed Amended Complaint, exhibits attached
8/23/74	Motion to Dismiss Amended Complaint
10/4/74	Order on Motion to Dismiss
11/1/74	Petition for Interlocutory Appeal
12/11/74	Defendants Motion for Summary Judgment
12/23/74	Judgment on Decision by the Court
1/16/75	Notice of Appeal
6/14/78	Judgment of Court of Appeals issued as Mandate—cause reversed and remanded—Record and Exhibits Received from Court of Appeals
6/16/76	Order Transferring to Judge Robert M. McRae, Jr.
8/5/76	Second Amended Complaint
8/25/76	Motion to Dismiss Second Complaint
3/29/77	Motion to Intervene as Plaintiff
3/29/77	Motion For Leave to file Amended Complaint
3/29/77	Amended Complaint of Plaintiffs' Complaint for Intervention
3/29/77	Response to Motion to Dismiss Second Amended Complaint
4/22/77	Order Granting Motion to Intervene as Plaintiff - Elnora Priest Cross, Edwin Owens and Carolyn Burse Allowed to Intervene
5/9/77	Order Denying Motion to Dismiss Second Amended Complaint and requiring a more specific Statement

5/24/77	Joint Motion of Plaintiff-Intervenors and Plaintiffs, N. T. Greene, et al. to amend Complaint in Intervention and Second Amended Complaint respectively.
9/27/77	Answer to Plaintiffs' Complaint for Intervention as Amended
9/29/77	Stipulation of Parties As to Maintenance of cause as a Rule 23(b) (2) Class Action
10/3/77	Order Granting Motion to Amend and Certification of Class Action.
12/16/77	Answers to Plaintiffs' First Interrogatories
2/3/78	Motion for Leave to File a Fourth Amended Complaint.
2/7/78	Defendants' Response to Plaintiff's Motion For Leave to file a Fourth Amended Complaint
2/9/78	Order Granting Leave to Amend
2/9/78	Pre-Trial Order
6/21/78	Memorandum Decision in Favor of Defendants
6/21/78	Judgment on Decision by the Court
6/30/78	Motion for Injunction Pending Appeal Pursuant to Rule 62(c) FRCP
6/30/78	Notice of Appeal
6/30/78	Notice of Motion for Injunction Pending Appeal
7/3/78	Order Denying Intervenors' Motion for Injunction to Stay Judgment Pending Appeal
7/7/78	Order Allowing Appeal in Forma Pauperis
8/15/78	Motion for Transcript of Proceeding at Government Expense
8/16/78	Order Allowing Free Transcript at Government Expense
9/28/78	Reporter's Transcript 3 Volumes

(Filed April 1, 1974)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

Civil Action No. 74-208

N. T. GREENE, EMANUAL GOLDBERGER, BETTY TAYLOR, WILSHIRE PARK CIVIC CLUB, AND SHANKMAN HILL CIVIC CLUB, separately and on behalf of all others similarly situated,
Plaintiffs,

vs.

CITY OF MEMPHIS, a municipal corporation, WYETH CHANDLER as Mayor of the CITY OF MEMPHIS, the COUNCIL OF THE CITY OF MEMPHIS, and EDWIN McBRAYER as Chairman of the COUNCIL OF THE CITY OF MEMPHIS,
Defendants.

COMPLAINT

1. This action arises under the Act of July 25, 1958, 72 Stat. 415, 28 U.S.C. 1331, a matter in controversy exceeding the value of $10,000.00, exclusive of interest and costs, and arising under the Constitution, laws and common law of the United States;

2. This action also arises under the Act of September 9, 1957, 71 Stat. 637, 28 U.S.C. 1343 (3), to redress the deprivation, under color of state legal action, of person and property rights secured by the Constitution of the United States and also by acts of Congress providing for equal rights;

3. This action also arises under the Act of April 9, 1866, 14 Stat. 27, 42 U.S.C. 1982, to insure by private attorneys general that all citizens of the United States shall

have the same rights, equal enjoyments, and property-linked benefits in the state as are enjoyed by white citizens and residents thereof.

4. This action proceeds also pursuant to the Act of July 7, 1958, 72 Stat. 349, 28 U.S.C. 2201, to declare rights and other legal relations of all of the interested parties herein for the matters referred to, whether or not such further relief be sought by some of them;

5. This action seeks to have declared unconstitutional governmental actions of defendants;

(a) in striking from municipal budget, planning funding, and construction of a $750,000 federal-state financed Community Center in Plaintiffs' neighborhood north of Jackson Avenue, Memphis, Tennessee; and

(b) in closing through traffic access to West Drive between Jackson Avenue and North Parkway Boulevard, Memphis, Tennessee; and

(c) in enforcing any and all municipal ordinances, resolutions, or activities relative to the foregoing specific matters, accomplished or sought to be accomplished without adequate notice and public hearing;

6. This action also seeks mandatory orders terminating the above particular deprivations of equal protection of laws and of due process of laws and implementing and fashioning judicial remedies to specifically provide fundamental services and allocate governmental funds:

(a) to construct and federally finance or otherwise pay for a $750,000 Community Center in plaintiffs' neighborhood north of Jackson Avenue; and

(b) to maintain open to through traffic West Drive between Jackson Avenue and North Parkway; and

(c) to establish and abide by provisions for notice and public hearing on all municipal matters determinative of basic human necessities, social benefits, or sensitive interest.

7. The individual Plaintiffs are citizens of the United States and citizens and residents of the City of Memphis, Shelby County, State of Tennessee, and the Civic Club Plaintiffs are unincorporated associations of similarly situated persons and all of the Plaintiffs, named and unnamed, have personal and property interests in the geographical area of the City of Memphis, hereinafter described.

8. All of the Plaintiffs individually and as a class reside in the City of Memphis in the geographical area north of Jackson Avenue and bounded by Springdale Street on the east and Watkins Street on the West and Wolf River on the north.

9. The Defendant City of Memphis is a political subdivision of the State of Tennessee and the municipal corporation duly administering and governing the properties and affairs of the people thereof, and the other defendants are the duly elected and acting executive and legislative officers, respectively of the City of Memphis.

10. On or about February 5, 1974, the Defendants, as aforesaid, unlawfully prevented, and do still so continue to prevent, the budgeting, planning, funding and construction of a $750,000 Federal and State financed Community Center in Plaintiffs' community;

11. On or about February 5, 1974, the Defendants, as aforesaid, unlawfully prevented and do still so continue to prevent Plaintiffs' vehicular access to and over West Drive

at Jackson Avenue and Springdale Street Extended, connecting Plaintiffs' community to North Parkway;

12. In all of the governmental activities involved in the foregoing, Defendants unlawfully failed and refused to give public notice and to provide for and hold public hearing to Plaintiffs;

13. Unless otherwise ordered so to do by this Court, Defendants intend to, threaten to, and will continue to unlawfully deprive Plaintiffs of the Community Center, the street access, and the notice and public hearings, all as aforesaid, and as a result of which Plaintiffs will suffer irreparable damages.

14. Damages to the Plaintiffs' personal, property, and civil rights and to their property-linked benefits and enjoyments, unlawfully deprive them of the basic human necessities, social benefits and sensitive interests constitutionally protected, as hereinabove referred to.

15. Pursuant to all of the foregoing, Plaintiffs are lawfully entitled to have this Court adjudicate their claims, redress their deprivations, insure their property-linked benefits, declare their rights and legal relations, and to have declared unconstitutional the actions of the Defendants complained of;

WHEREFORE, Plaintiffs pray the Court to issue its orders, judgments and decrees for Plaintiffs and against Defendants on the matters and things aforesaid, and particularly

Plaintiffs pray to the Court to issue mandatory orders terminating Defendants' said actions and implementing and fashioning judicial remedies which, under the circumstances, give Plaintiffs equal protection of the laws, due process of the laws, and specifically provide fundamental governmental services and allocate governmental funds;

(a) to construct and federally finance or otherwise pay for a $750,000 Community Center in plaintiffs' neighborhood north of Jackson Avenue; and

(b) to maintain open to through traffic West Drive between Jackson Avenue and North Parkway; and

(c) to establish and abide by provisions for notice and public hearing on all municipal matters determinative of basic human necessities, social benefits, or sensitive interest.

FINAL PRAYER

For attorney fees, costs and such other relief as the Court deems proper.

Respectfully submitted,

Byrd and Kustoff
745 Commerce Title Building
Memphis, Tennessee 38103
By: /s/ Frank C. Byrd
Attorney for the Plaintiffs

(Jurat Omitted in Printing)

(Filed August 22, 1974)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE

(Title Omitted in Printing)

AMENDED COMPLAINT

Plaintiff, N. T. Greene herein continues to adopt entirely his original Complaint, sworn and subscribed to on the 29th day of March, 1974, and filed on April 1, 1974, and in addition thereto pursuant to Rule 15 (a), Federal Rules of Civil Procedure, Plaintiff hereby amends his original Complaint as a matter of course by substituting the following:

PART I

Facts as to the Closing of West Drive

1. That Plaintiff and other concerned citizens learned of the closing of West Drive about the middle of November, 1973, from a phone call by Mr. Calvin Woods (a civic-minded resident of the Wilshire Park area). Mr. Woods said there was something in the local newspaper about the closing of West Drive. Sometime later, on or about the 25th day of January, 1974, while at the City Hall on other business, Plaintiff noticed the closing of West Drive was on the City Council agenda. The Council was to meet on January 29, 1974, to decide the proposal. Plaintiff and others decided to put out a "leaflet" informing the general public of the resolution. Further, Plaintiff and others worked making phone calls, contacting people, and etc. encouraging people to attend the Council meeting.

2. That about 50 people (who live north of Jackson Avenue) went to the Council meeting on January 29, 1974, at 2:30 p.m. Plaintiff here to the Court shows the full minutes of that meeting and offers them as an exhibit. That at the hearing, the Chairman allowed time (15 minutes) to the proponents for closing West Drive, and time (15 minutes) to the proponents against the closing. The following arguments were made for closing West Drive:

(a) *Mr. Bob Miller* (Director of Planning for the City of Memphis) said the Planning Commission had reviewed this matter on November 1, 1973, and recommended that there be a "conditional closing" approximately 25 foot wide. That Hein Park residents would pay for the relocation costs, and that the Fire Department wanted a 24 foot clearance without any obstruction other than the "row of curbing", and normal types of "speed breakers". That he had a letter from L, G, & W (Memphis Light, Gas, and Water), offering no objections (never produced); a letter from the Sanitation Department, offering no objection (never produced); a letter from the Telephone Company, offering no objection (never produced); a letter from the Police Department, indicating some reservations about the closing because more time would be required for "police calls", but basically no objection (never produced). Further, Mr. Miller had "telephone communications with the Fire Department and Public Works Department which indicated the conditions required by the Planning Commission. That he had sent letters to the Public Works Department (copies of letters never produced), but had never received a written reply one way or the other. That he assumed no reply meant "sanction". That he has continued to call

the Public Works Department, but has never received an "official communique". Further, that there was a lengthy "public hearing" on this matter at a meeting of the whole Planning Commission. That notices were sent out to the people up and down West Drive, and there was only one objection (Mrs. Sarah F. Terry, at 732 West Drive). That as far as Mr. Miller knew, all the residents within West Drive participated in the application to close West Drive. Mr. Miller closed by saying he would like to see the subdivision stay in its "tranquil atmosphere", and the closing of West Drive was vital to maintain a "good mid-town residential area".

(b) There was then some discussion regarding an "internal report" from the traffic engineer to Frank Palumbo on October 22, 1973, but the report was not before the Council.

(c) *Mr. Clay Huddleston* (Chief Administrative Officer of Mayor's Office) testified the Mayor approved the closing.

(d) *Mr. Bob Miller* said the closing of the street would allow emergency vehicles to get through.

(e) *Mr. David Parker* (resident of West Drive[)] spoke and stated he had been a resident of West Drive for 30 years. He told the Council a bus load of Hein Park residents were present in the Council room. That there was some five years of study and planning involved.

(f) *Dr. Bill Weber* (a resident of West Drive and chairman of the Hein Park Civic Association) stated the subdivision had been in existence for 50 years. He talked about a traffic engineer who reported

there were 1,600 to 1,700 cars per every 12 hours in the area or about 2,000 cars per day. That in the mornings and afternoons the traffic count was about 200 cars per hour or one car every 15 seconds. That the heavy traffic originated in other areas of the City and not in Hein Park. That the traffic could be sent on other collector streets. That there would be several speed breakers, a roll curb, and emergency vehicles could get through. There would also be an extended sidewalk and appropriate signs. He stated he did not feel their action was setting a precedent. That there are a number of dead end streets, a number of streets two blocks long, that have no destination, in Memphis, That in newer subdivisions (in Memphis) this type of traffic flow is automatically built into the plans. Further, the residents of Hein Park are not attempting to "isolate" themselves from any other part of the neighborhood. That the different sizes of the houses in Hein Park shows no great bias. Dr. Weber referred to a letter from the Central Garden Area Association (which letter was before the Council) supporting the Hein Park residents. Further, Dr. Weber stated that unless the Hein Park residents did something, the 50 year-old subdivision would "deteriorate".

(g) *Mrs. Betsy Robbins* (a resident of West Drive) testified the traffic had become "heavier and heavier". That residents did not want to cut themselves off from their neighbors, but the greatest worry is "children". She found herself "daily" rushing to the window when she heard screeching brakes. She further stated "we" lost a dog on the street, but she was thankful it was not a child.

(h) *Mr. Joseph Haas* (a consulting engineer in the City of Memphis) said the closing would amount to speed breakers and a 24 foot "clear passage" for emergency vehicles. The speed breakers were to discourage any through traffic.

(i) Mr. Miller testified again that any of the utilities that have to be relocated will be done at the residents' costs.

3. For those opposing the closing of West Drive, the following arguments were made:

(a) *Mrs. Sarah Terry,* (a resident of West Drive) said she used the Jackson Avenue - West Drive entrance "daily", and was told by a member of the Planning Commission staff, that they had to have 100% approval by the residents of West Drive. She feels West Drive is a public street and the residents could not "dictate" who may or may not use the street. That West Drive is definitely a convenient road for people coming south on Springdale. That West Drive is the only through street between University and Trezevant. That as far as safety of children is concerned, that is the responsibility of parents. That to close West Drive would simply re-route other traffic from within Hein Park to that of another street within Hein Park.

(b) *Mrs. Vicki Vincent* (of the Vollintine-Evergreen Community Action Association) stated there were two residents, who live on West Drive, who opposed the closing (the Terry family and the Thomas family). She said speed breakers would be a deterrent to through traffic and sidewalks could provide safety for children and elderly

residents. That to close the street would set a "dangerous precedent". That when this matter was initially brought before the Planning Commission (4th day of October, 1973), it was rejected. That if West Drive was closed the VECAA fears the Council will be opening up a "giant can of worms". That citizens from Red Acres to Parkway Village, from Chickasaw Gardens to Central Gardens will want the same thing. That people all over the City will want the same thing.

(c) *Mr. Calvin Woods, Jr.* (a resident of East Drive) stated West Drive is a public street built and maintained by all of your tax money. That the residents of West Drive should be made to build public sidewalks just as he was made to do in the front of his house.

(d) *Mr. Emanual Goldberger* (a resident of Barbara Drive) said he was against the closing because it is the only place that has a traffic light that leads us out of our part, north of Jackson between Springdale and Hollywood. That the children on East Drive, Trezevant, and Barbara Streets are just as dear to their parents as the children in Hein Park. That the Council should build a park in the area for the children to play in.

(e) *Mr. Henry Jackson* (representing Shankman Hill Civic Group) stated he and others paid a great deal of taxes. That the "speed breakers" will cause mass confusion with the intersection (some cars trying to make turns and others going through Hein Park). He remarked, "I believe that the law applies to everybody equal". There would be no accidents if sidewalks were put in.

(f) Rev. Cummings (a resident at Springdale and Almeda) stated if a sidewalk was needed on West Drive, then the Council should authorize it, but not close West Drive.

(g) *Plaintiff* stated Hein Park residents had continuously, since the 1940's, "waived the law", in so far as public sidewalks are required in residential areas, for their own benefit. That now the Hein Park residents want West Drive closed. That tax payers' money built and maintained West Drive all these years, and tax payers' money will continue to maintain West Drive. That he had talked to State Rep. Doyle Daniels, who opposed the closing of West Drive. That to close West Drive will set a dangerous precedent.

4. That after the proponents for and against had spoken, there was a general discussion among the Council members about the merits and demerits of the closing of West Drive. Some thought that the problem was one simply of traffic and speed and that speed breakers were the only thing necessary. Councilman Ford pointed out that speed breakers could not be located on a "dedicated street" and could only be put on private property. Mr. Ford further recommended a speed of 20 m.p.h. and radar units to patrol the neighborhood. Mr. Allissandratos stated, we have closed alleys in the past, but that West Drive is not an "alley". He had information that the Police Department thought the closing could cause disruption of police services in the area. Councilman Love said the heavy flow of traffic (through Hein Park) impeded the Police Department's work, citing an instance when the police were looking for a "molester" that was getting "males" all over town, a year or so ago. Mr. Huddleston testified 820 cars passed through the West Drive in a 12

hour period. Councilman James suggested a compromise by putting a 15 mile speed limit on West Drive. Mr. Woods spoke up and said that he was going to tell it like it is, "They don't want the Black people in there noway. That's the way it is." Mr. Woods further said, "I doubt if a hundred cars go through there during the day between 7:00 or 6:30 till 9:00. There may be that many cars, maybe 200". That the Council then voted on the resolution, 8 - 3 in favor, thereof.

5. That later Councilman Bob James informed Plaintiff on the 30th day of January, 1974, that Councilman Allissandratos would ask the whole Council to reconsider the closing of West Drive at its next meeting on February 5, 1974. That before the February 5th meeting, Plaintiff and other interested citizens did the following to further the justness of their cause:

(a) Held a press conference in front of the Jackson Avenue Church of Christ at the intersection of Jackson Avenue and West Drive; announced to their fellow citizens the Council was going to reconsider the resolution.

(b) Held a public meeting in the Jackson Avenue Church of Christ where the following civic leaders spoke:

(1) Mr. Russell B. [Sugarmon] (well-known Black political leader)

(2) Councilman Ford

(3) Rev. David Shanks (Overton Park Church of Christ)

(4) Plaintiff

That at the end of said meeting, it was decided people should go down for the February 5th Council meeting to express their opposition to the closing of West Drive.

6. That on February 5, 1974, at 2:30 p.m., Plaintiff and other citizens appeared before the City Council. That Plaintiff and others desired to address the Council, but were denied this right. That Chairman McBrayer refused such rights saying the "public hearing" had already been had. The Council further refused to accept 742 signatures on various Petitions (copies here to the Court shown, and entered as an exhibit) (said Petitions were received later by the Council on February 19, 1974, and Plaintiff offers as an exhibit the entire transcript of the Council meeting that date). That a vote was taken on the motion to reconsider, and the vote was 7 - 5 against.

7. That subsequently, Councilman Ford put a new resolution on the agenda to reopen West Drive. That on Tuesday, the 26th day of February, 1974, there was to be a "public hearing" before the Public Works Committee, with the full Council. That on said date, and at said time, and for said business, no one showed up, but Plaintiff, Councilman Ford, and other interested citizens. Again Plaintiff and others were denied any further public hearings. Plaintiff here to the Court shows the entire transcript of the Council's meeting, February 26, 1974.

8. That a week later, on the 5th day of March, 1974, the same resolution by Councilman Ford (to reopen the closing of West Drive) failed by a vote of 6 - 4. That again there were no public hearings at this time. That Plaintiff became exasperated and began to seek relief before this Honorable Court. Plaintiff here to the Court shows the transcript of the Council's meeting, March 5, 1974.

9. Further, Plaintiff says that he now shows to the Court the entire Planning Commission file on the closing of West Drive, beginning in July, 1970, and running up until the present Council's vote. Plaintiff enters this report as an exhibit to his cause. Further, that therein is con-

tained various studies, maps, and proposals by the various City Departments, demonstrating their recommendations. Plaintiff says that, for some unknown reason, this information, in its complete form, was kept from the full Council. Further, that a careful reading of this entire file indicated there is no valid reason for the closing of West Drive.

10. Further, Plaintiff says that the closing of West Drive is based on racial prejudice. That Hein Park subdivision is surrounded by expanding Black residential areas. That Hein Park residents are almost all White, and they desire to keep "Blacks" from traveling through Hein Park, by cars, by sidewalks, or otherwise. That a part of the whole history of Hein Park has been to promulgate racial interests and/or prejudices. That as far back as 1940, when the Overton Park Zoo allowed Negroes only one day a week in the Park, the Hein Park residents refused to build sidewalks on West Drive so as to keep Negroes from walking to the Park and Zoo through West Drive. That ever since the 1940's, West Drive residents have systematically stopped the paving of sidewalks on their drive.

11. Plaintiff here to the Court shows and offers as an exhibit, excerpts from the official minute book of the Memphis Park Commission, demonstrating racial prejudices. Further, Plaintiff offers information from the Division of Public Works as an exhibit, describing how, when, where, and the priorities for building City sidewalks. Plaintiff asks the Court to note that second highest priority for building City sidewalks is for streets furnishing access to *park*, playgrounds, shopping centers, and other community facilities. The first priority relates to schools.

12. Further, Plaintiff says the Defendant's actions in closing West Drive were unreasonable, capricious, and were never supported by substantial proof. That the Defendant's actions deprived Plaintiff and others of their

property rights without due process of law and equal protection of the law as protected by the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. 1982, 28 U.S.C. 1343 (3). That Defendant's actions in closing through traffic access to West Drive between Jackson Avenue and North Parkway Boulevard, Memphis, Tennessee, was an unconstitutional governmental action.

13. Plaintiff prays for the same relief as heretofore set out in his original Complaint and said original Complaint as heretofore stated is adopted in its entirety.

PART II

Facts as to Refusal to Build Community Center

1. That Plaintiff and other citizens of Shelby County became interested and saw the need for a community center in the Vollintine School area. That at the time of their awareness, Plaintiff was a member of the Shelby County Democratic Voters Council, Precinct #40-2. A precinct club meeting was called and the possibility of the center and needs for same discussed. That such a meeting occurred during the early part of September, 1973, at N. Michael Circle, Memphis, Tennessee. That at the conclusion of said meeting, it was decided to inform the larger Black community of the needs and the desirability of a community center.

2. Later, a larger public meeting was called and held at the [Baron] Hirsch Synogogue on September 9, 1973. Among those present were the following civic leaders:

(a) Councilman J. O. Patterson

(b) Councilman Bob James

(c) Maxine Smith - Memphis School Board Member

(d) Rabbi Skoop ([Baron] Hirsch Synogogue)

(e) Father John Scola (Little Flower Catholic Church)

(f) Rev. Lloyd Barker ([McLean] Baptist Church)

(h) Many other interested citizens

3. That at said meeting, there was a general discussion and a general consensus of the obvious need for such a facility. It was agreed such a facility could do the following for the community area:

(a) curb juvenile delinquency

(b) give young people a place to play and a place to put their energies.

(c) it was to be a supervised recreation center

(d) seamstress classes to teach girls to sew

(e) offer guidance (organized) to children in area on how to develop their talents

(f) athletic sports

(g) give young people and adults a safe place to congregate at night

(h) be used as an education forum for the arts and crafts

(i) be used for people in the area to get to know each other on a friendly, relaxed, and enjoyable basis

4. That at the conclusion of said meeting, it was agreed a representative contact the Mayor's office and arrange a meeting.

5. That a letter, dated October 10, 1973, was sent to Mayor Wyeth Chandler (copy here to the Court shown) requesting a meeting with him. That such a meeting took place at the Mayor's office, October 30, 1974, at 11:00 a.m.

That at the meeting the following civic leaders of the Vollintine Community area were present:

(a) Plaintiff

(b) a number of housewives, and others from the area

(c) a representative of the Park Commissioner's office

(d) Mr. Irving Sachritz (Vollintine-Evergreen Community Action Association)

The meeting with Mayor Wyeth Chandler was cordial and it was agreed the Mayor would order his staff to see if funds were available for such a community project. The Mayor said he would be "in touch" and would let everyone know the results of his investigation in a week or ten days.

6. The Mayor later informed the Plaintiff he had discussed the matter with Mr. Clay Huddleston (Mayor's chief administrative officer), and found a justification for the proposed facility. That it would be placed in the Capital Improvements Program (which would shortly be submitted to the Memphis City Council) (copy of page in Capital Improvements Program here to the Court shown and entered as an exhibit). That subsequently, Mayor Chandler was invited to appear and speak to the residents of the Vollintine-Evergreen area at the Barren Hirsch Synogogue. The talk and meeting took place on the 16th day of January, 1974, at 7:30 p.m. Plaintiff was master of ceremonies, and introduced the Mayor. Among those attending were the following civic leaders:

(a) Rabbi Rafael Grossman (the newly installed Rabbi of the [Baron] Hirsch Synogogue[)]

(b) Squire Jessie Turner (Shelby County Court)

(c) Mrs. Irene Dycus (Chairwoman of the Memphis Political Cacus [sic])

The Mayor said he brought "sad tidings". That the Council's Budget Committee had removed the proposed center from the Capital Improvements Program. That discussion and debate was held and it was concluded an attempt would be made to have the item put back in the budget and "public hearings" held.

7. That Plaintiff sent a letter to Councilman Allissandratos (Chairman of the Budget Committee) on January 17, 1974. Plaintiff generally said the citizens wanted this project restored to the budget and "public hearings" held before the Budget Committee. A reply came from Mr. Allissandratos denying Plaintiff's request. On January 18, 1974, Plaintiff sent a letter to Councilman Ed McBrayer (Chairman of the City Council) requesting public hearings before the Council (copy here to the Court shown). On January 23, 1974, Plaintiff received a letter (copy here to the Court shown) from Councilman McBrayer, wherein he stated the Budget Committee did not hold "public hearings", and the Budget Committee's "recommendations" would be heard before the "public session" of the Council on February 5, 1974.

8. The Council meeting on February 5, 1974, took place at 2:30 p.m. Plaintiff here to the Court shows the entire minutes of said Council meeting, and enters them as an exhibit. That at the said meeting, Plaintiff and other interested citizens learned the proposed Vollintine Neighborhood Facility had been deleted from the Budget Committee's report to the Council. Further, there was only one way to get the Center reconsidered, and that was an amendment with a second to same. Councilman Ford made the motion and Plaintiff asked Councilman Patterson to second the motion, but Councilman Patterson refused. The Chairman then allowed Plaintiff to raise questions to the Council, but told Plaintiff the Council did not have to "answer" any questions. Plaintiff told

the Council the proposed facility called only for Federal and State funds. That there had never been any "public hearings" on the center, and he felt such a lack thereof was unfair and unjust. Councilman Patterson spoke up and said there were no Federal monies available for such a facility, and that even the past president of the Park Commission was in the audience, nodding his head "approvingly". That a roll call was taken, and Councilman Ford's amendment died for lack of a second. The present Capital Improvements Program was approved by the Council, without the Vollintine Neighborhood Facility being in same.

9. That Plaintiff and other citizens had the following information to present to the Budget Committee and/or to the Council which was not considered:

(a) A letter dated October 22, 1973, from Miss Eddie Ruth Echols, Director of Research and Demonstration Projects for Shelby County Intergovernmental Coordination Department, (copy here to the Court shown). That said report demonstrated the sources of Federal and Private Foundation resources for a project such as the Vollintine Neighborhood Center.

(b) A count of persons by age, race, and sex of the Vollintine area (copy here to the Court shown).

(c) A mimeographed copy of a letter on January 18, 1974, to Councilman Ed McBrayer (Chairman of the City Council) demonstrating the need for such a facility (copy of letter here to the Court shown).

10. Further, Plaintiff says that during the time of the Budget Committee's study, no "public hearings" were ever held (though they were optional) (see rule .....).

That the City Council was well aware of the "public interest" of the project, and never held "public hearings" (though they were optional - see rule .....). That the Council knew of the "public interests" as demonstrated by the following:

(a) Public meetings were held in the neighborhood by interested citizens.

(b) Literature was deciminated [sic] over a large section of the community.

(c) Car loads and a bus load of residents and children attended the Mayor's office and succeeded in convincing him of the need for such a facility.

(d) Various civic groups or representatives thereof came to the neighborhood meeting Council meeting, and met with Mayor Chandler:

(1) Vollintine-Evergreen Community Action Association

(2) University Lanes Improvement Club

(3) McClain Baptist Church

(4) Shelby County Democratic Voters Council

(e) From N. Parkway to Wolf River, From Hollywood Street to Watkins Street, there is no supervised neighborhood facility.

(f) That there was an "obvious" need for such a facility.

11. Further, Petitioner says that there have been seven community centers built in the City of Memphis since 1970. (copy of letters from Park Commission office here to the Court shown and offered as an exhibit). That the costs and locations of said centers demonstrate a racial bias or prejudice. That the Plaintiff here to the Court

shows a letter from the Commissioner of Parks recommending community centers every one to one and one-half mile radius of each neighborhood. That no reason has been pointed out for not putting a center in the Vollintine-Evergreen area except to say that there is a facility at Bickford Park, and the Klondyke Street area. (Bickford Park is five miles from Vollintine School; the Klondyke Street facility is more than one mile from the Vollintine School). That the center just completed at Bickford cost $640,000.00 (2/3 of the money coming from the U. S. Government). That the proposed center at Raleigh will cost over one million dollars, and this is a White neighborhood. That Mr. James E. Hadaway (Executive Director, Memphis Park Commission) stated in his letter to Plaintiff (copy here to the Court shown) that the "goals" of the Commission called for the City to build centers within one mile of every citizen of Memphis, hopefully to serve between 10,000 and 25,000 population. That this had been the ". . . position of the Memphis Park Commission since the inception of the Capital Improvements Program in 1968." That the Vollintine-Evergreen area fits the criteria for the Park Commission's goals.

12. Further, Plaintiff says that as a result of Defendant's action, no public hearings were ever held by either the Budget Committee or the full City Council on the proposed Community Center. That such refusal of hearings was without reason and denied the Plaintiff "due process of law" and "equal protection of the law", as guaranteed by the Fourteenth Amendment of the United States Constitution, and as protected by 42 U.S.A. [sic] 1982, 28 U.S.C. 1343 (3). That the Defendant's refusal to build same was arbitrary, capricious, and unreasonable, and unlawful. That the actions of the Defendants in striking from the municipal budget, planning, funding, and construction of a $750,000 (Federal-State financed) Commu-

nity Center in Plaintiff's neighborhood, north of Jackson Avenue, Memphis, Tennessee, was unconstitutional governmental action.

13. Plaintiff prays for same relief as heretofore set out in his original Complaint and said Complaint as heretofore stated is adopted in its entirety.

14. Plaintiff additionally prays for mandatory orders directing the City Council of Memphis, Tennessee, to restore the said community center to the municipal budget and to hold public hearings on same.

PART III

Facts as to Lack of Public Hearings

1. Further the Plaintiff says he here to the Court shows and enters as an exhibit a copy of the Rules of Procedure as adopted by the City Council of Memphis, Tennessee. That said Rules were in effect when the Plaintiff was not allowed full public hearings on either the resolution to close West Drive or the deletion from the municipal budget of the proposed Vollintine-Evergreen community center.

2. Plaintiff says that the Rules of Procedure were violated in regards to the community center in the following ways:

(a) Rule C-38 gave the Budget Committee optional public hearings which were never allowed by said Committee.

(b) That at no time does the record ever reflect that any public hearings were ever heard on the proposed community center.

3. Plaintiff further says that the Defendants violated the Rules for a public hearing on the closing of West Drive in the following manner:

(a) That the so called "public hearing" that was held was unreasonable, unfair, and unjust.

(1) There was no notification to the general public or more specifically to the neighborhoods most readily affected.

(2) That the time allowed for both sides to present their arguments was too short.

(3) That no cross-examination was allowed of any witnesses by general public.

(4) That no opportunity was allowed to examine documents offered by opposing sides.

4. Further Plaintiff says that such denials of public hearings and denials of public notices violates his and others Constitutional rights as protected by the following:

(a) The "due process" and "equal protection" clauses of the 14th Amendment of the U. S. Constitution.

(b) The right to petition the Government for a "redress of grievance" protected by the 1st Amendment of the U.S. Constitution.

5. Further Plaintiff says that to close West Drive from free "access" by fellow citizens of Shelby County without adequate, reasonable, and fair public hearings and notices thereof, violates the Plaintiff's and other's right as guaranteed in the 13th Amendment of the U. S. Constitution: "That neither slavery or involuntary servitude except as a punishment for a crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction". That is to say, that to deny equal "access" is to deny "equal protection of the law", is to deny "due process" and to subject non-residents of Hein Park to slavery or involuntary servitude for the maintenance and care of West Drive.

6. Plaintiff says that to close West Drive or to delete the said community center from the municipal budget, without fair public hearings and fair public notices, violated the Plaintiff's and other's Constitutional rights as guaranteed by the 9th Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". Further, such actions by the Defendants violates the Plaintiff's and other's Constitutional rights as guaranteed by the 10th Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

7. Plaintiff prays for the same relief as heretofore set out in his original Complaint and said original Complaint as heretofore stated is adopted in its entirety. Plaintiff further asks for mandatory orders to require the Defendants to have fair public notice and fair public hearings on all matters of public interest.

Respectfully submitted:

Raymond P. Gibbs
Attorney at Law
107 Professional Bldg.
Murfreesboro, TN 37130

By: Raymond P. Gibbs
Attorney for Plaintiff,
N. T. Greene

(Certificate of Service and Jurat Omitted in Printing)

(Filed October 4, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

No. C-74-208

N. T. GREEN, EMANUAL GOLDBERGER, BETTY TAYLOR, WILSHIRE PARK CIVIC CLUB, and SHANKMAN HILL CIVIC CLUB, separately and on behalf of all others similarly situated,
Plaintiffs,

vs.

CITY OF MEMPHIS, a municipal corporation, WYETH CHANDLER as Mayor, et al,
Defendants

ORDER ON MOTIONS TO DISMISS

Plaintiffs allege that they are citizens of Memphis and that two civic clubs, Wilshire Park and Shankman Hill, also plaintiffs, are unincorporated associations of "similarly situated persons." They sue the City of Memphis, the City Council, and the Chairman of the City Council on the following asserted bases:

(1) 28 U.S.C. 1343(3) to redress the deprivation, under color of state legal action, of constitutionally secured personal and property rights;

(2) 42 U.S.C. 1982 to insure that all persons have same rights and enjoyments as those of white citizens;

(3) 28 U.S.C. 2201 for declaratory judgment. Specifically, plaintiffs complain about two specific actions of the City Council and/or the Mayor in "striking from municipal budget . . . a $750,000 federal-state financed

Community Center in plaintiffs' neighborhood," and "in closing through traffic access to West Drive between Jackson Avenue and North Parkway." They seek mandatory relief from the Court to correct these allegedly unconstitutional acts and violations of their civil rights.

Defendants have filed a motion to dismiss on the basis of asserted lack of jurisdiction in the Court, and because no substantial cause of action arising under the laws or Constitution is alleged. First attention is given to the prospective closing of West Drive.[1]

I. WEST DRIVE CLOSING AT NORTH END

It may be deemed to have been a moot issue relative to the closing of West Drive at its northern terminus, Jackson Avenue, since no actual impediment to passage at this point has been erected, except that a declaratory judgment as to the rights of the parties might be appropriate if the Court has jurisdiction of this cause of action and these parties for any purposes. 42 U.S.C. 1982[2] came into being after the Civil War to prohibit discrimination against negroes in the inheritance, purchase, sale, holding or conveying of property. *Hurd v. Hodge*, 334 U.S. 24 (1948); *Jones v. Mayer Co.*, 392 U.S. 409 (1968). These cases gave a broad construction to the language of the statute. Nowhere, however, has this language been construed to confer property rights to Negroes *beyond* those which belong to white citizens. None of the plaintiffs

---

1. At the hearing it was disclosed that West Drive had not actually been closed, but plaintiffs protest the resolution authorizing the closure at Jackson Avenue.

2. "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

on West Drive;[3] none are deprived of reasonable ingress and egress to their property; the street is not proposed to be closed to blacks and open to whites. In short, the effect of the proposed closing, whether wise or unwise, is the same upon whites as it is to blacks. *Palmer v. Thompson,* 403 U.S. 217 (1971). There is no facial discriminatory import to the resolution of closure, and there is no assertion that it will be implemented or administered in a racially discriminatory fashion or effect. Plaintiffs complain only that they will be denied access to West Drive from the north just as every other citizen will be. Attached to this Order is a city map showing the location of the area in controversy. It shows that by a very short detour to the east or west via Charles or Cypress Drive, one may proceed southwardly from Jackson Avenue towards North Parkway via a portion of West Drive, and that within approximately one quarter to a half mile east or west of West Drive there are "through streets"[4] providing non-stop direct routes from Jackson to North Parkway without an intervening stop or bends or curves as on West Drive. See *Mandell v. Commissioners of Bernalillo Co.,* 99 P(2d) 108, 4 NM 109 ( ). Plaintiffs also contend that there was no "public notice" of the action taken with regard to the resolution. Regardless of this contention, which the Court does not reach, this attempted attack upon the right to close the access to West Drive at one end of this approximately one-half mile long road is unavailing. Plaintiffs as "citizens" who do not assert themselves to be contiguous or adjacent property owners, have no such public property right in the entry to a street, which is not alleged to be

---

3. The nearest named plaintiff lives, according to the City Directory, many blocks from West Drive. A number of others claiming to be interested in a letter to the Court live at least four blocks away.

4. [Trezevant] and University.

essential to them for any purpose, to petition this Court to require it to remain open for their possible convenience. Plaintiffs have no standing for this purpose. Plaintiffs have not been denied their interstate right to travel, or their "equal utilization, without discrimination upon the basis of race, of any public facility" or to travel freely upon *interstate* highways or other instrumentalities as in *United States v. Guest*, 383 U.S. 745, 757 (1966). This is not a case of asserted discrimination against blacks in deprivation of necessary public instrumentalities, such as utilities or paved streets, or of unequal treatment in the furnishing of these essential instrumentalities. Plaintiffs have failed to state a cause of action with respect to the purported West Drive closure, as and if effectuated, whether on the basis of racial discrimination or on the basis of unequal protection of rights. "Subject to the limitations contained in the Constitution . . . the power of a state to vacate streets or other public ways within its borders is plenary and absolute, and this power may be exercised by the state legislature or may be delegated to a municipal corporation. . . ." 64 C.J.S., *Municipal Corporations*, Sec. 1665. See *Cash & Carry Lbr. Co. v. Olgiatti*, 215 Tenn. 287, 385 S.W.2d 115 (1964).

Plaintiffs have no constitutional property rights in continued access to West Drive under the facts asserted or on the basis asserted in the complaint. They have no standing as affected property owners on the street to due process notice and hearing.

"In the absence of an allegation of fraud or a manifest abuse of discretion, courts will not inquire into the motives of municipalities for vacating a municipal street." *Sweetwater Valley Mem. Park v. City of Sweetwater*, 372 S.W.2d 168 (Tenn. 1963) cited in *Cash & Carry Lbr. Co. v. Olgiatti, supra*, 385 S.W.2d 117.

Whether or not the state or local statutory procedure in bringing about the alleged impending closure was followed is a state court matter not a federal question concerning which this Court has jurisdiction. See *Byington v. Bass,* 11 Tenn. App. 569, 572 (1930) holding that the general public, not relying upon subdivision representations, have no such property right as claimed by plaintiffs in a street similar to West Drive.[5]

II. STRIKING COMMUNITY CENTER BUDGET ITEM

Plaintiffs ask that the Court "by mandatory orders . . . specifically provide fundamental services and allocate governmental funds (a) to construct and federally finance or otherwise pay for a $750,000 community center in plaintiffs' neighborhood. . ." Again, with reference to the city map hereinabove made reference to, the Court notes that within the area described that plaintiffs "as a class" reside, it is noted that there are three city parks of substantial size and another community facility (Klondike) lying just west of Watkins.[6] Dave Wells Community Center is also situated in North Memphis less than a mile from the western boundary of the area described as that in which plaintiffs assert a special interest. Plaintiffs assert that defendants in February "unlawfully prevented, and . . . continue to prevent the budgeting, planning, funding, and construction of a $750,000 federal and state financed community center." They also claim that their civil rights and prop-

---

5. Plaintiff Greene's amended complaint goes into detail with regard to notice and a public hearing prior to the closure of West Drive, though he was dissatisfied with the conclusion the Memphis City Council reached.

6. University Park is about one-half mile from plaintiff Greene's residence; Gooch Park is little more; and May Park is within a mile.

erty rights and their "property-linked benefits and enjoyments" are damaged and deprived.

Apparently, by inference, plaintiffs claim that the defendants' failure to construct the community center equates to deprival of "basic human necessities," and deprivation of equal protection. Plaintiffs quote from *Beal v. Lindsay*, citation unknown, that availability of distant parks is not a consideration. The location of other nearby parks and recreation or community facilities is a matter of proper consideration and the Court takes judicial notice of the location of them on the attached map.

Nowhere in the complaint is it stated that the City's alleged failure to act was discriminatory to blacks, or to the poor, or how this amounted to a violation of equal protection. Assertion of not budgeting, planning, funding, or constructing a community center without any assertion of pertinent circumstances as to comparative or unequal treatment with relation to other citizens of the larger community does not state a cause of action for racial discrimination nor of a constitutional violation. *Gautveaux v. City of Chicago*, 480 F.2d 210 (7th Cir. 1973), cited by plaintiffs, relates to the refusal of Chicago authorities to locate public housing projects in white neighborhoods. There is simply no assertion in this complaint relating to housing project discrimination of the type involved in that case. *Feliciano v. Romney*, 363 F.Supp. 656 (S.D. N.Y. 1973) is similarly inapplicable as dealing with alleged failure under a number of federal statutes to relocate after eviction proceedings had been instituted in an area of Harlem.[7]

---

7. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968) is similarly inapplicable. Plaintiff also relies on *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971); en banc, 461 F.2d 1171 (1972) which dealt with discrimination

(Continued on following page)

The determination whether to build and when or where to build a community center is essentially a political discretionary decision of City of Memphis officials. No allegation is made to indicate any constitutional deprivation in the decision made with respect to February, 1974. "Federal Courts are reluctant to enter the field of local government operations." *Hawkins v. Shaw*, 461 F.2d 1173. Compare *Coleman v. Aycock*, 304 F.Supp. 132 (N.D. Miss. 1969) which ordered racial desegregation of public facilities but held no need for the court to interfere with municipal operations relating to fire hydrants, paving streets, police protection, drainage, and the like. "The governing authorities of a municipality in the provision of public services and the operation of public facilities are entitled to the widest discretion, and the Courts should not undertake to control or interfere with the exercise of such discretion in the absence of bad faith or abuse." *Supra*, 304 F.Supp. 146. No allegation of bad faith or gross abuse of discretion is made in this complaint. Indeed, Greene's amended complaint sets out in detail that the Council and defendants heard their contentions about the need for a community center in the [Vollintin]-Evergreen area and declined, after discussion and consideration, to insert that item in this year's budget. (There is in the amended complaint admittedly no basis for the conclusion in the original complaint that such community center would be federally and state financed.) A court does not ordinarily look to the motives of the legislature or munic-

---

Footnote continued—

in service of necessities to a majority black population in a Mississippi town that had historically deprived them of necessities such as paved streets, street lights, sanitary sewers, water mains or drainage, and fire hydrants. That case dealt "only with the town of Shaw, Mississippi, and the facts as developed in the record." 461 F.2d 1173. The Court noted a significant change in the situation with election of a black councilman. Memphis had at the time the suit was brought three black councilmen.

ipal council in adopting a law or ordinance of the kind under consideration. *Palmer v. Thompson, supra.*

Under any circumstances, however, the Court does not have the authority to order by way of mandamus defendants to do any act, non-ministerial or discretionary in its nature, such as requiring the City or defendants to plan and construct a community center. *Tannery Bass Anglers Sportsman's Society v. Scholze,* 329 F.Supp. 339, 350 (E.D. Tenn. 1971). This is not to say that the Court may not in a proper case order certain acts be done or not to be done to effect an end to prohibited discrimination, or to provide due process or equal protection in appropriate situations. The complaint or amended complaint fails to state a cause of action and should be dismissed except as to paragraph 11, Part II (page 15) of the amended complaint. This one section asserts that the actions of the City since 1970 in building community centers has demonstrated racial bias or prejudice. While the Court denies the relief requested in the form originally sought, it will proceed in this cause on the sole issue raised as to whether defendants since 1970 have, in fact, demonstrated racial bias in construction of community centers. Plaintiffs may be able to prove a set of facts in support of their claim (if it is "ripe" and if they have standing) which may entitle them to some relief. There is no constitutional notice or hearing issue, however, before the Court.

Except to the extent indicated in the last paragraph above, defendants' motion to dismiss is granted.

This 4th day of October, 1974.

/s/ Harry W. Wellford
United States District Court Judge

(Decided May 13, 1976)

N. T. GREENE, et al.,
Plaintiffs-Appellants,

vs.

CITY OF MEMPHIS, a Municipal Corporation, et al.,
Defendants-Appellees.

No. 75-1339.

United States Court of Appeals,
Sixth Circuit.

Argued Feb. 13, 1976.

Decided May 13, 1976.

Action was instituted against city and various of its officials for alleged unlawful closing of street. The United States District Court for the Western District of Tennessee, Western Division, Harry W. Wellford, J., dismissed complaint for failure to state a claim, and one plaintiff appealed. The Court of Appeals, John W. Peck, Circuit Judge, held that complaint averring that closing of street pursuant to authority of mayor and council chairman conferred certain benefits, to wit, privacy and quiet of an exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods was sufficient to state a claim for relief under civil rights statutes against mayor and council chairman, but was insufficient to state a claim against city or its council.

Reversed and remanded.

1. Civil Rights (Key) 13.12(3)

Complaint averring that closing of street pursuant to authority of mayor and council chairman conferred certain

benefits, to wit, privacy and quiet of an exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods was sufficient to state a claim for relief under civil rights statutes against mayor and council chairman, but was insufficient to state a claim against city or its council. 42 U.S.C.A. §§ 1982, 1983.

2. Federal Civil Procedure (Key) 674

That individual plaintiff failed to specifically allege a claim under statute covering deprivation of civil rights did not operate to preclude him from recovering on that claim in event allegations showed and proof supported claim. 42 U.S.C.A. § 1983.

3. Civil Rights (Key) 13.13(1)

To establish that closing of street by city officials conferred certain benefits, to wit, privacy and quiet of exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods, plaintiff was required to prove that city officials conferred closed street on residents of area because of their color; he was also required to prove racial motivation, intent or purpose, in absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation. 42 U.S.C.A. §§ 1982, 1983.

Raymond P. Gibbs, Murfreesboro, Tenn., for plaintiffs-appellants.

Joseph B. Dailey, Asst. City Atty., Charles V. Holmes, Memphis, Tenn., for defendants-appellees.

Before PHILLIPS, Chief Judge, and PECK and LIVELY, Circuit Judges.

JOHN W. PECK, Circuit Judge.

Plaintiffs Greene, Goldberger, Taylor, Wilshire Park Civic Club, and Shankman Hill Civic Club charged in their district court complaint that defendants-appellees City of Memphis, its Mayor, its Council, and its Council Chairman unlawfully closed West Drive to through traffic and unlawfully deleted from the municipal budget a joint-funded $750,000 community center. By amended complaint, Greene charged that City had since 1970 located seven community centers on racial bases and closed West Drive on racial bases. The district court granted appellees' motion to dismiss, for failure to state a claim, Fed.R.Civ.P. 12(b)(6),[1] the West Drive and budget deletion claims, and Greene "petition[ed] for [an] interlocutory appeal." Prior to the district court's certifying such petition, the district court proceeded to a non-jury trial of the community center location claim, which was dismissed with prejudice at the conclusion of Greene's proof. Greene thereafter filed a notice of appeal.

---

1. Although appellees moved to dismiss also for lack of jurisdiction over the subject matter, Fed.R.Civ.P. 12(b)(1), and although the district court simply granted appellees' "motion to dismiss," subject matter jurisdiction under 28 U.S.C. § 1343(3) would have attached if a 42 U.S.C. § 1983 claim were stated. *Amen v. City of Dearborn*, 532 F.2d 554, 558-559 (6th Cir. 1976); *Hanna v. Drobnick*, 514 F.2d 393, 397 (6th Cir. 1975). Likewise, if Greene had stated a 42 U.S.C. § 1982 claim, there was subject matter jurisdiction under 28 U.S.C. § 1343(4). *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n. 1, 88 S.Ct. 2186, 2189 n. 1, 20 L.Ed.2d 1189, 1192 n. 1; *Jennings v. Patterson*, 460 F.2d 1021, 1022 (5th Cir. 1972); *Young v. AAA Realty Co.*, 350 F.Supp. 1382, 1387 (M.D.N.C.1972). It follows that the district court dismissal was for failure to state a claim, Fed.R.Civ.P. 12(b)(6).

On appeal, Greene[2] claims that the district court erred in granting the motion to dismiss. We agree. Axiomatically,

> "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96 (1974), quoting *Conley v. Gibson,* 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1975).

Scheuer emphasized that

> "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." 416 U.S. at 236, 94 S.Ct. at 1686, 40 L.Ed.2d at 96.

Accord, *Dunlap v. State of Tennessee,* 514 F.2d 130, 133 (6th Cir. 1975).

[1] We view Greene as having stated claims under 42 U.S.C. § 1982 and 42 U.S.C. § 1983. Section 1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by

---

2. Although the court of appeals docket sheet styles Greene, Goldberger, Taylor, Wilshire Park Civic Club and Shankman Hill Civic Club as plaintiffs-appellants, "[p]laintiff, N. T. Greene," through his attorney, filed the petition for interlocutory appeal and notice of appeal. Similarly, the appellate brief refers to "appellant." The use of the singular apparently is significant in light of a letter in the record indicating the decision of a "Committee to Reopen West Drive" to "separate" its "petition" from Greene's "petition." Because the complaint prays for equitable relief ordering the city officials to keep West Drive open, rather than for damages, whether there is one, or more than one, appellant is for present purposes insignificant. See *Craft v. Memphis Light, Gas & Water Division,* 534 F.2d 684, 685-687 (6th Cir., filed April 12, 1976).

white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, *Timson v. Wright*, 532 F.2d 552, 553 (6th Cir., filed March 23, 1976), citing *Scheur, supra*, 416 U.S. at 236, 94 S.Ct. at 1686, 40 L.Ed.2d at 96, reasonably aver that the closing confers certain benefits, *to wit*, the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis, than similarly situated whites who "hold" their "real property" subject to having the city confer the dead-end street benefit on their property. Though we have found no section 1982 case on-point, the liberal construction that courts have afforded section 1982 buttresses our conclusion that Greene has stated a section 1982 claim. See, e. g., *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Jennings v. Patterson*, 460 F.2d 1021 (5th Cir. 1972), 488 F.2d 436, 442 (5th Cir. 1974); *Battle v. Dayton-Hudson Corp.*, 399 F.Supp. 900, 905 (D.Minn.1975).

[2] That Greene failed to specifically allege a section 1983[3] claim cannot preclude him from recovering on a section 1983 claim, should the allegations show and the proof support such a claim. See, e.g., *Janke Const. Co. v.*

---

3. Neither the complaint nor amended complaint mentions section 1983, but both allege jurisdiction through 28 U.S.C. § 1343(3), the jurisdictional counterpart of section 1983. The amended complaint also generally tracks the language of section 1983 in alleging that

> "[d]efendant's actions deprived plaintiff and others of their property rights without due process of law and equal protection of the law as protected by the Fourteenth Amendment. . . ."

Vulcan Materials Co., 527 F.2d 772, 776-77 (7th Cir. 1976), *aff'g* 386 F.Supp. 687, 692 n. 3 (W.D.Wis.1974); *Ailshire v. Darnell*, 508 F.2d 526, 528 (8th Cir. 1974); *Parr v. Great Lakes Express Co.*, 484 F.2d 767, 773 (7th Cir. 1973); *United States v. Martin*, 267 F.2d 764, 771 (10th Cir. 1958); *Dotschay v. National Mut. Ins. Co.*, 246 F.2d 221, 223 (5th Cir. 1957). We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those "person[s]" clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets.

Of course, no section 1983 claim is stated against the City of Memphis or its Council. See *Amen v. City of Dearborn*, 532 F.2d 554, 558-559 (6th Cir. 1976).

The district court, in dismissing, relied too heavily on *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), *aff'g* 419 F.2d 1222 (5th Cir. 1969) (*en banc*), which sustained closing of municipal swimming pools against equal protection challenges because the closings prevented whites and blacks equally from utilizing municipal swimming pools. Accord, *Mahaley v. Cuyahoga Metropolitan Housing Auth.*, 500 F.2d 1087, 1092-93 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 781, 42 L.Ed.2d 805 (1975). Similarly, the closing of West Drive, as the district court noted, affects Greene "just [like] every other citizen," white and black, by "deny[ing] access to West Drive from the north." Yet as noted above, the complaints also reasonably allege that the city has conferred certain benefits on white residents of West Drive, though refusing to confer those benefits on similarly situated black neighborhoods, thereby falling within the *Palmer* caveat that

> "[s]hould citizens of . . . [any] city be able to establish in court that public, tax-supported swimming pools are being denied to one group *because* of color and supplied to another, they will be entitled to relief." 403 U.S. at 227, 91 S.Ct. at 1946, 29 L.Ed.2d at 446 (emphasis supplied).

Similarly, the complaint falls within *Hawkins v. Town of Shaw,* 437 F.2d 1286 (5th Cir. 1971), 461 F.2d 1171 (5th Cir. 1972) (*en banc*), which condemned the conferral of municipal services on racial bases.

We recognize that the allegations nowise approach the egregiousness of the facts found in *Town of Shaw,* and endorse the *Town of Shaw* caveat that it is not to be

> "impl[ied] or suggest[ed] that every disparity of services between citizens of a town or city creates a right of access to the federal courts for redress. We deal only with the town of Shaw, Mississippi, and the facts as developed in this record." 461 F.2d at 1173.

See *Towns v. Beame,* 386 F.Supp. 470 (S.D.N.Y.1974) (even assuming that the closing of eight fire companies had disproportionate impact on racial minority response areas, no "sufficiently serious" question of equal protection to justify preliminary injunction, where fire department has satisfactorily rebutted plaintiffs' prima facie case of racial discrimination by proving non-racial rationale for closings).

[3] To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motiva-

tion. Compare *Nashville I-40 Steering Comm. v. Ellington,* 387 F.2d 179, 185 (6th Cir. 1967), *cert. denied,* 390 U.S. 921, 88 S.Ct. 857, 19 L.Ed.2d 982 (1968), and *Kelly v. Romney,* 316 F.Supp. 840, 844 (S.D.Ohio 1970), with *Town of Shaw, supra.* See also *Bronson v. Board of Educ.,* 525 F.2d 344, 347-49 (6th Cir. 1975), *cert. denied,* ..... U.S. ....., 96 S.Ct. 1665, 48 L.Ed.2d 175 (1976).

This view does not conflict with *Palmer, supra,* which noted that "no case in this Court has held that a legislative act may violate equal protection *solely* because of the motivations of the men who voted for it." 403 U.S. at 224, 91 S.Ct. at 1944, 29 L.Ed.2d at 444 (emphasis supplied). See *Citizens Comm. for Faraday Wood v. Lindsay,* 507 F.2d 1065, 1070 n. 11, 1074 n. 6 (2d Cir. 1974), *cert. denied,* 421 U.S. 948, 95 S.Ct. 1679, 44 L.Ed.2d 102 (1975), and accompanying text. In *Palmer,* the closings left whites and blacks alike without municipal pools; consequently, there was "no state action affecting blacks differently from whites." 403 U.S. at 225, 91 S.Ct. at 1945, 29 L.Ed.2d at 445. According to the instant complaint allegations, the closing of West Drive left certain white residents with privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street.

In reversing, we, of course,

> "intimate no evaluation whatever as to the merits of [Greene's] claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of [his] respective complaints, [Greene was] entitled to have them judicially resolved."

Scheuer, supra, 416 U.S. at 250, 94 S.Ct. at 1693, 40 L.Ed.2d at 105.

Reversed and remanded.

(Filed June 7, 1976)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

(Title Omitted in Printing)

ANSWER OF DEFENDANTS

Pursuant to the decision of the United States Court of Appeals decided and filed May 13, 1976, defendants file the following answer and response concerning the issues remaining in the lawsuit as set out in the opinion of the Court.

1. The complaint fails to state a cause of action against the defendants upon which relief may be granted.

2. Defendants deny that the closing of West Drive confers benefits on residents of West Drive that the City has refused to confer on similarly situated black neighborhoods.

3. Defendants deny that City officials conferred the closing of the northern entrance/exit of West Drive on West Drive residents because of their color or that such action was in any manner based upon racial motivation.

4. Defendants deny that black citizens of Memphis have been denied the opportunity to acquire such dead end streets in their neighborhoods because of their race.

5. Defendants deny that the Mayor and the then Council Chairman Edwin McBrayer have conferred benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets.

6. Defendants say that the citizens of any neighborhood making application to the City Council to acquire such a

dead-end street have been, are presently, and will be treated with equal consideration, with the racial makeup of the area having no bearing upon such application.

All remaining allegations contained in the original or amended complaint neither admitted nor denied are now specifically denied.

/s/ Arthur J. Shea
Arthur J. Shea
Assistant City Attorney
/s/ Charles V. Holmes
Charles V. Holmes
Assistant City Attorney
Room 314, 125 North Main
Memphis, Tennessee 38103

(Filed March 29, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

MOTION TO INTERVENE AS PLAINTIFF

Plaintiffs - Applicants for Intervention, pursuant to Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure, through their attorneys, move for leave to intervene as plaintiffs in this action, in order to assert the claims set forth in their proposed complaint, a copy of which is hereto attached, on the grounds that:

(a) The Applicants claim an interest relating to the property or transaction which is the subject of the action and they are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest.

(b) The Applicants claims and the main action have questions of law and fact in common.

Respectfully submitted,

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
Memphis & Shelby County Legal Services
325 Dermon Bldg., 46 N. Third Street
Memphis, Tennessee 38103
526-5132
Attorney for Applicants for Intervention

(Filed March 29, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiffs move the Court for leave to file an amended complaint, a copy of which is hereto attached as Exhibit A, on the grounds that the original complaint failed to include the names of the following plaintiffs, Edwin Owens, Elnora Priest Cross, and Carolyn Burse.

Respectfully submitted,

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
Memphis & Shelby County Legal Services
325 Dermon Bldg., 46 N. Third Street
Memphis, Tennessee 38103
526-5132
Attorney for Plaintiff

(Certificate of Service Omitted in Printing)

(Filed March 29, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

AMENDED COMPLAINT OF PLAINTIFF'S COMPLAINT FOR INTERVENTION

I

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343 (3) and (4) and 28 U.S.C. §2201. This action is brought pursuant to the Thirteenth and Fourteenth Amendments of the United States Constitution to redress the deprivation of rights, privileges, and immunities secured thereby. This action is also brought pursuant to 42 U.S.C. §1982 and §1983, to enforce the right of Plaintiffs to inherit, purchase, lease, sell, hold and convey real and personal property on the same basis as white citizens and for the deprivation of rights, privileges, and immunities secured by the Constitution and laws.

II

This is a suit for injunctive and other affirmative relief from discrimination, prohibited [by] the Thirteenth Amendment to the Constitution of the United States and 42 U.S.C. §1982. Plaintiffs also seek damages, declaratory and injunctive relief against discrimination, which discrimination has resulted in the denial of equal protection of the laws and due process of law guaranteed under the Fourteenth Amendment to the constitution of the United States and 42 U.S.C. §1983.

III

Plaintiffs Cross, Burse, and Owens are black citizens and residents of Memphis, Shelby County, Tennessee. Cross resides approximately one and one half miles from West Drive, specifically at 1303 Smith Avenue. Plaintiff Owens resides at 1408 N. Bellvue, also situated approximately one and one half miles from West Drive. Burse resides at 1238 Weakley Drive, approximately one mile from West Drive.

Burse, Cross, and Owens object to the closing of the West Drive.

IV

Plaintiffs bring this action on their own behalf, and pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure on behalf of similarly situated black citizens seeking to enjoin the closing of West Drive to through traffic. Such black citizens have been deprived of the right to inherit, purchase, lease, sell, hold, and convey real and personal property on the same basis as white citizens as a result of the approval of street closings by the Defendants on the basis of race or color. The class represented by Plaintiffs is so numerous that joinder of all members is impracticable; there are general facts of law common to the class; the claims or defenses of Plaintiffs will fairly and adequately protect the interests of the class. The Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and/or corresponding declaratory relief with respect to the class as a whole.

V

On July 9, 1973 application was made by residents of the Hein Park Civic Association for closing a portion of West Drive, to wit:

Beginning at a point in an extension of the south property line of Jackson Avenue where said property line crosses the north end of West Drive, said beginning point being 37.92 feet west of the northwest corner of the re-subdivided north part of Lot No. 77 in Hein Park Subdivision, as measured along said extension of the south property line of Jackson Avenue and running thence westwardly along said extension of property line 37.92 feet to the northeast corner of the re-subdivided north part of Lot No. 53; thence southwardly along the west property line of West Drive 26.1 feet to a point; thence eastwardly along a line 25.0 from and parallel with Jackson Avenue 37.92 feet to a point in West Drive; thence northwardly and parallel with the west property line of West Drive 26.1 feet to the point of beginnings as shown on the attached plat.

VI

Plaintiffs allege that Defendant's, [sic] on the basis of race, have deprived them of the right to inherit, purchase, lease, sell, hold, and convey real and personal property on the same basis as white citizens. The closing of West Drive at the north end will result in the dead ending of that street conferring upon white residents of West Drive and Hein Park certain benefits not available to blacks living in adjoining and surroundings streets, benefits which inure to white citizens in the form of increased property values, solitude, safety, and better environmental quality in general for the residents of West Drive and Hein Park. Defendant's decision to close West Drive was done in contravention of established procedures with the full purpose and intent of depriving Plaintiffs of their constitutional right to equal protection and due process.

VI

On the basis of race, Defendants will continue to deny blacks the right to inherit, purchase, lease, sell, hold, and convey real property and as well as to deprive them of rights, privileges and immunities secured by the Constitution and laws of the United States.

Plaintiffs have no plain adequate or complete remedy at law. They are suffering and will continue to suffer irreparable injury because of the racially discriminatory policy, practice, custom and usage of Defendants.

VII

As a direct and proximate result of the wrongful acts by the Defendants, Plaintiffs have suffered actual damages in an amount to be proven at trial and will continue to suffer damages by the Defendants' decision to close the north end of West Drive, without adequate notice and hearing procedures, on the basis of the racial makeup of that community in deprivation of Plaintiffs' constitutional and statutory rights to inherit, purchase, lease, sell, hold and convey real and personal property without regard to race.

VIII

WHEREFORE, Plaintiffs respectfully pray that this Court will render judgment for the Plaintiff as follows:

1. Granting Plaintiffs and the class they represent a preliminary and permanent injunction enjoining defendants, their agents, employees, and those acting in concert with them, from maintaining discriminatory policies and practices against Plaintiffs and the class they represent by the closing of West Drive and ordering the building of sidewalks, curbs, and gutters, along West Drive.

2. Granting Plaintiffs and the class they represent a declaratory judgment that the acts, policies, and practices of defendants complained of herein violate the Thirteenth and Fourteenth Amendments to the United States Constitution and the provisions of 42 U.S.C. Sections 1982 and 1983.

3. Granting Plaintiffs a preliminary and permanent injunction enjoining Defendants, their agents, employees, and those acting in concert with them from denying Plaintiffs the right to inherit, purchase, lease, sell, hold, and convey real and personal property as is enjoined by white citizens.

4. Granting Plaintiffs damages against defendants to compensate for property value decreases.

5. Granting Plaintiffs judgment against Defendants, and each of them jointly and severally, for punitive or exemplary damages.

6. Awarding Plaintiffs their costs herein.

7. Awarding Plaintiffs reasonable attorneys' fees.

8. Granting Plaintiff and the class they represent such further, additional and different relief as the Court may deem just and proper.

Respectfully submitted,

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
Memphis and Shelby County Legal Services Association
46 North Third Street
Memphis, Tennessee 38103
901-526-5132
Attorney for Plaintiff

(Filed April 11, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

No. C-74-208

N. T. GREENE, et al.,
Plaintiffs,

vs.

CITY OF MEMPHIS, A Municipal Corporation; WYETH CHANDLER as Mayor of the City of Memphis; THE COUNCIL OF THE CITY OF MEMPHIS; and EDWIN McBRAYER as Chairman of the Council of the City of Memphis;
Defendants,

ELNORA PRIEST CROSS, EDWIN OWENS, and CAROLYN BURSE,
Applicants for Intervention.

ORDER GRANTING MOTION TO INTERVENE AS PLAINTIFFS

Plaintiffs-Applicants for Intervention, Elnora Priest Cross, Edwin Owens, and Carolyn Burse, have moved the Court pursuant to Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure for leave to intervene as plaintiffs in this cause in order to assert the claims as set out in their proposed Complaint. Plaintiffs-Applicants seek injunctive and other relief against alleged discrimination in violation of 42 U.S.C. §1982 and §1983, the Thirteenth and Fourteenth Amendments to the United States Constitution, and for declaratory relief pursuant to 28 U.S.C. §2201. The Motion to Intervene is not opposed.

It appearing that the applicants claim an interest relating to the property or transaction which is the subject of this action and that they are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect their interest; and it further appearing that the Applicants' claims and the main action contain questions of law and fact which are in common;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiffs-Applicants for Intervention, Elnora Priest Cross, Edwin Owens, and Carolyn Burse, are hereby allowed to intervene in this action, to file their Complaint for Intervention, and to protect their interests as declared therein.

The Motion to Intervene having been granted, it is FURTHER ORDERED that plaintiffs' Motion for Leave to File Amended Complaint so as to add the intervening parties as parties to the original action is hereby denied as moot.

ENTER: This 21st day of April 1977.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge
United States District Court

(Filed May 24, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

JOINT MOTION OF PLAINTIFF-INTERVENORS AND PLAINTIFFS N. T. GREENE, ET AL. TO AMEND COMPLAINT IN INTERVENTION AND SECOND AMENDED COMPLAINT RESPECTIVELY

Plaintiff Intervenors through their attorneys and Plaintiff N. T. Greene, Pro Se, move this Court to amend and supplement their complaints previously filed herein in the following particulars; Amending Plaintiffs' Second Amended Complaint, Paragraph I, and amending Plaintiffs Intervenors' Complaint in Intervention Paragraph IV as follows;

1. That, historically, the general area known as Hein Park in the City of Memphis, Tennessee has been an [sic] predominantly white well-to-do area and that the white residents of said area with the support and acquiescence of defendant City officials and their predecessors in office have sought to preserve the all white nature of said area free from all incursions by black residents into said area;

2. That for black residents of Springdale Street and other areas to the north of West Drive, said Drive is a public way through Hein Park and is a direct and essential route of access to Snowden School, a public school, and the north entrance to Overton Park, a public park,

and said way is traversed mainly by black youth and other blacks traveling to the aforementioned point.

3. That the residents of West Drive and surrounding areas opposed, and always have opposed, such incursions by the aforesaid blacks;

4. That in support of and as an integral part of such opposition that white residents of West Drive who own property abutting said public way have failed, refused, and/or neglected to install sidewalks as required by City policy and that Defendant City officials have been in active concert with such refusal and have, through deliberate inaction and otherwise aided and abetted the failure, refusal or neglect to install such sidewalks;

5. That such conduct and/or inaction constitute(s) State action which has had and still has the effect of maintaining the all white nature of West Drive to the detriment of the black class members in this action because in traversing West Drive said blacks are subjected to traffic perils of having to walk in the public way;

6. That the aforementioned acts by defendant City officials have all been perpetrated on the basis of race.

The grounds for this motion are as follows:

(a) That by order, dated May 9, 1977, the Court ordered the Plaintiffs herein to file additional pleadings amplifying their allegations with regard to the sidewalk issue. This Court has the authority to allow such an amendment although no motion for a more specific statement has been filed. *U.S. v. Sinclair Refining Company*, 126 F.2d 827, 830 (10th Cir., 1942).

(b) The amendment to the Plaintiffs' complaints will not cause any prejudice to the Defendants in maintaining their defense on the merits of this case.

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
46 North Third Street
Memphis, Tennessee 38103

/s/ Brother Greene
Brother N. T. Greene, Pro Se
1074 Terry Circle
Memphis, Tennessee 38107
Attorney for Plaintiff-Intervenors

(Certificate of Service Omitted in Printing)

(Filed Sept. 27, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

ANSWER TO PLAINTIFFS' COMPLAINT FOR INTERVENTION AS AMENDED

Come now the defendants and for answer to the Second Amended Complaint, as amended, and the Complaint for Intervention, as amended, state the following:

FIRST DEFENSE

Plaintiffs fail to state a claim upon which relief can be granted.

SECOND DEFENSE

This Court lacks jurisdiction to hear this cause as there is no substantial federal claim alleged against the defendants.

THIRD DEFENSE

In Civil Action No. 74-565, brought by N. T. Greene, Willie Jackson and Virginia Donaldson against the City of Memphis, Wyeth Chandler, Edwin McBrayer, the Council of the City of Memphis, and Frank Palumbo, it was alleged that the City of Memphis failed to provide public sidewalks on both sides of West Drive from Jackson Avenue South to North Parkway. See Exhibit #1.

Upon motion of the defendants, the United States District Court for the Western District of Tennessee, Western Division, dismissed the complaint on December 30, 1974, stating that such problems are political legislative problems as to which there is no legally cognizable claim in this Court and to which the Court has no jurisdiction. See Exhibit #2.

It is the contention of the defendants herein that the ruling of the Court in Civil Action No. 74-565 is *res judicata* as to the issue of requiring the City of Memphis to immediately construct curbs, gutters and sidewalks on West Drive.

FOURTH DEFENSE

In response to the factual allegations of the Second Amended Complaint, as amended, and the Complaint for Intervention, as amended, that are still at issue before this Court, defendants would say as follows:

1. Pursuant to the Court's ruling the defendants regard the factual allegations of the Second Amended Complaint as superceded [sic] by the Joint Amendment filed by the plaintiffs in this action, and, therefore, do not address themselves to the allegations contained in the Second Amended Complaint.

2. Defendants have no knowledge as to the residence of the plaintiffs, and, therefore, neither admit nor deny

the allegations set forth in Paragraph III of their Complaint for Intervention, but demand strict proof thereof.

3. Defendants deny the allegations set forth in Paragraph IV of the Complaint for Intervention and further deny the allegations set forth in paragraphs 1, 2, 3, 4, 5 and 6 of the Amendment to the Complaint for Intervention filed.

4. Defendants admit the allegations set forth in Paragraph V of the Complaint for Intervention.

5. Defendants deny the allegations set forth in both paragraphs that are numbered VI (there are two paragraphs marked VI) and also those in Paragraph VII of the Complaint for Intervention.

6. All allegations not heretofore specifically admitted or denied are now denied as if specifically denied.

WHEREFORE, defendants pray that the Court dismiss the Amended Complaints, render judgment in favor of defendants on all issues remaining before the Court, and allow the defendants to to [sic] hence with their reasonable costs.

Respectfully submitted,

/s/ Charles V. Holmes
Charles V. Holmes
Assistant City Attorney
/s/ Michael C. Speros
Michael C. Speros
Assistant City Attorney
Room 314 City Hall
125 North Main St.
Memphis, TN 38103
Attorneys for Defendants

(Certificate of Service Omitted in Printing)

Exhibit #1

(Filed November 6, 1974)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

CIVIL ACTION NO. C-74-565

WILLIE LEE JACKSON, N. T. GREENE and VIRGINIA DONALDSON, Separately and on behalf of all others similarly situated,
Plaintiffs,

vs.

CITY OF MEMPHIS, a municipal corporation, WYETH CHANDLER as Mayor of the CITY OF MEMPHIS, and EDWIN McBRAYER as Chairman of the Council of the CITY OF MEMPHIS, and FRANK P. PALUMBO as Chief Engineer and Director of Public Works of the CITY OF MEMPHIS,
Defendants.

This case assigned to HARRY W. WELLFORD, JUDGE.

Complaint, Request to the Court for Order to Show Cause Why an Immediate Mandatory Order to Correct These Conditions Should Not Be Issued Promptly.

1. This is a Class Action Suit.

2. This action arises under the United States Constitution and Bill of Rights, 1st, 9th and 14th Amendments and other applicable laws.

3. The City of Memphis has the duty under the Constitution and laws of the State of Tennessee to live up to its established high standards and provide safe and sanitary conditions for the school children and other citizens of Memphis.

4. Failure of the city government to take the necessary permanent corrective measures to prevent raw human sewage from backing up and overflowing into the boiler room, halls and auditorium adjacent to and below the lunch room and kitchen in Cypress Junior High School for the "past few years." SOURCE: Memo annexed hereto date 3/21/74.

5. Failure of the city government to take permanent corrective action to remove the cause for the raw sewage relief valve "carrying sewage overflow into Cypress Creek" which is adjacent to a residential community and said relief valve is less than ¼ mile from Cypress Junior High School. SOURCE: Memphis and Shelby County Health Department Study dated 11/13/72.

NOTE: Sewage from the relief valve floats just past Cypress Junior High School less than 40 feet from where students are on the north side of that building. Said overflow is almost continuous.

6. Failure to take permanent corrective action to stop "continuous" or "periodic sewage contamination" of Overton Bayou which flows on two sides (west and south) of Cypress Junior High School and the adjacent residential community.

SOURCE: Memphis and Shelby County Health Department Study dated 11/13/72 annexed hereto.

7. Failure to take permanent corrective action to stop sewage from "overflowing from manholes" in the "large lake like sump area" of N. Watkins Street and Chelsea Avenue when the river is high. SOURCE: Memphis and Shelby County Health Department Study dated 12/7/73 annexed hereto.

8. Failure to permanently remove the cause of raw sewage "running into Cypress Creek at N. McLean and

Cypress Creek." SOURCE: Letter, Stanley Black dated 11/6/72 annexed hereto.

9. Failure to provide public sidewalks on both sides of University Street from Cypress Junior High School to Chelsea Avenue. Gooch Park is located on the corner of Hunter and University which is between Cypress Junior High School and Chelsea Avenue.

Note: City law requires as first priority sidewalks on streets leading to and from schools. The second priority is given to streets leading to and from parks. City law copy annexed hereto.

10. Failure to provide public sidewalks on both sides of West Drive from Jackson Avenue south to N. Parkway to increase the safety of the children who live on West Drive and attend Snowden Junior High School.

a. Note: Many parents who live on West Drive have sought to "increase the safety to the many children who live in the subdivision (Hein Park) and those who use the subdivision to walk to Snowden Junior High School." Petition dated 7/9/73 annexed hereto.

b. Note: The number two priority for sidewalks are streets leading to parks and playgrounds. The only entrance to Overton Park and the Overton Park Zoo on the north side is at N. Parkway near West Drive. City law copy annexed hereto.

c. Note: According to the Principal at Snowden Junior High School many of his students daily violate the trespass law by using the campus of Southwestern University seeking a safe route to and from Snowden Junior High School. Taylor letter of 9/9/74 annexed hereto.

11. The plaintiffs are citizens of the United States and residents of the city of Memphis, Shelby County, State

of Tennessee. All of the plaintiffs, named and unnamed, have a personal and social interest in the immediate, permanent solution to the listed violations of our rights.

12. There has been at least one serious outbreak of a disease, encephalitis, in the north Memphis area in recent months. Exactly to what extent that disease and other illnesses have affected the children of Cypress Junior High School and the residents who live adjacent to Cypress Creek is not known to the plaintiffs at this time. Therefore, plaintiffs request damages for tests of all children currently enrolled in and who have attended in the last six years Cypress Junior High School of $300,000.00. Plaintiffs also request $40,000.00 for the medical testing of persons living adjacent to or very near Cypress Creek for the past six years. Attached hereto C.A. 9/25/74.

13. Failure to act on a special resolution passed by a majority of the members of the Board of Education of the City of Memphis asking the city government to take *EMERGENCY ACTION* on two of the above items (items #4 and #10). Resolution passed on September 23, 1974, copy annexed hereto.

Note: Traffic engineer's survey given to School Superintendent on 9/12/74 *prior* to September 23, 1974 but kept from board members. Copy annexed hereto dated 9/14/74.

14. On or about November 1, 1974 the defendants (City Council) refused to take the *EMERGENCY ACTION* requested by the Board of Education to remove the "hazardous conditions" that are a "clear and present danger to the lives of the students who attend those schools" and the general community.

Note: School Board Resolution dated 9/23/74 annexed hereto.

15. The Defendant City of Memphis is a political subdivision of the State of Tennessee and the municipal corporation duly administering and governing the properties and affairs of the people thereof, and the other defendants are the duly elected and acting executive and legislative officers, respectively of the City of Memphis.

16. State law requires that children *must* attend the schools.

17. The city government has failed to abide by the Constitution and laws of this State by failing to act positively on the request of Memphis Board of Education and the many requests of the affected citizens of the north Memphis to correct these very serious problems. Therefore, our rights have not been properly respected under the Articles and Amendments of the U.S. Constitution.

FINAL PRAYER

Plaintiffs further request other declaratory injunctive and equitable relief as this Court deems proper and necessary, together with Court cost and legal expense.

Respectfully submitted

Plaintiffs in person

/s/ Virginia Donaldson
1023 Springdale
Memphis, Tenn.

/s/ N. T. Greene
1074 Terry Circle
Memphis, Tenn.

/s/ Willie Lee Jackson
1615 May St.
Memphis, Tenn.

November 6, 1974

Exhibit #2

(Filed December 30, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

Civil C-74-565

N. T. GREENE, et al.,
Plaintiffs,

vs.

CITY OF MEMPHIS, et al.,
Defendants.

Memorandum Decision Dismissing Action

This matter was last before the court on motion of plaintiffs for appointment of counsel to represent them, and the court entered an order on December 27, 1974, denying the motion. In such order, the court stated that a motion to dismiss the complaint was pending and that the court would defer acting on the motion to dismiss to allow plaintiffs, with or without counsel, to respond to the motion. Since the entry of such order, plaintiffs have orally pointed out to the court correctly that they had in fact (on December 11) responded to the motion to dismiss, that they have no prospect of obtaining counsel, and that they desire that the court proceed to rule on the motion to dismiss.

In their complaint, plaintiffs allege that certain undesirable conditions—some of them having to do with improper sanitation—exist in North Memphis and that the defendant local authorities will not take action to correct such conditions. Defendants in their motion to dismiss

contend that the complaint does not state a claim for relief and further contend (and such contention is supported by affidavits and therefore, to that extent, is in effect a motion for summary judgment) that the defendants are in the process of correcting the sanitation conditions.

We conclude that plaintiffs have not, in their complaint, stated a basis for subject matter jurisdiction in this court and have not stated a claim for relief that is cognizable in this court. Plaintiffs simply complain that bad conditions exist in North Memphis, that it is the duty of the defendant local authorities to correct the conditions, that the local authorities have failed to do so upon demand, and therefore plaintiffs ask this court to order the local authorities to correct the conditions. This, then, is another example of the earnest citizen who, on the mistaken notion that the federal courts operate like Swedish ombudsmen, come into court and seek to lay the problem in the court's lap. It is small wonder, these days, that many citizens have such ideas. This problem, however, is a political-legislative problem as to which this court has no jurisdiction and as to which there is no legally cognizable claim in this court.

This court does not rule on defendants' contention that plaintiffs cannot *pro se* maintain a class action, though they can, as they have, maintain this action for themselves without counsel.

The Clerk will enter a final judgment dismissing this action.

ENTER this 30th day of December, 1974.

/s/ Bailey Brown
Chief Judge

(Filed October 3, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

C-74-208

N. T. GREENE, et al.,
Plaintiffs,

vs.

CITY OF MEMPHIS, A Municipal Corporation, et al.,
Defendants.

ORDER GRANTING MOTION TO AMEND AND CERTIFICATION OF CLASS ACTION

The plaintiffs in this cause of action have jointly moved the Court to amend their respective Complaints, amplifying their allegations with regard to the City of Memphis's enforcement of its ordinances requiring sidewalks. In an Order dated May 9, 1977, this Court instructed plaintiffs to file a more specific statement concerning this issue. The Court finds that the plaintiffs have complied with these instructions.

Therefore, IT IS ORDERED that the specific allegations contained in this Motion shall hereby amend the Complaint in Intervention and the Second Amended Complaint heretofore filed in this action by the respective plaintiffs, and the defendants shall answer or otherwise respond to the amendments within twenty days from the date hereof.

In addition, the plaintiff/intervenors have moved the Court for certification of this action as a class action under FRCP 23. It appearing that all of the requirements of Rule 23(a) and 23(b)(2) have been met, and it further

appearing that opposing counsel does not object to this suit being maintained as a class action under the terms set out in the stipulation filed September 29, 1977. Therefore the class, as described in the above mentioned stipulation, is hereby certified as a plaintiff in this action.

ENTER: This 3rd day of October 1977.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge

(Filed December 16, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

ANSWERS TO PLAINTIFFS' FIRST INTERROGATORIES

Come now the defendants, Wyeth Chandler and Oscar Edmonds and in accordance with Rule 33 of the Federal Rules of Civil Procedure, hereby answer those interrogatories propounded to them by the plaintiff.

INTERROGATORY NO. 1

Does the City of Memphis, at the present time, intend to proceed with the closing of that section of West Drive which is the subject of this controversy?

ANSWER TO INTERROGATORY NO. 1

Yes.

INTERROGATORY NO. 2

If the answer to Interrogatory No. 1 is in the affirmative please provide the timetable for such closure.

ANSWER TO INTERROGATORY NO. 2

At the present time there is no actual timetable for the closure of West Drive other than to postpone such closure pending the outcome of this lawsuit. If the City is successful in this lawsuit we will then proceed in making plans to close West Drive.

INTERROGATORY NO. 3

Has the City of Memphis over the last ten (10) years received from residents of predominantly black areas applications to close streets?

ANSWER TO INTERROGATORY NO. 3

Yes.

INTERROGATORY NO. 4

If the answer to Interrogatory No. 3 is in the affirmative please provide the following; (a) the date of such application, (b) the location covered by such application, (c) the names and addresses of the applicants, (d) the reasons for the desired closing, and (e) the action if any taken on such applications.

ANSWER TO INTERROGATORY NO. 4

1. a. March 19, 1968.

   b. Closure of Autumn Avenue and alley from 2-A, L & N Railroad to 3-A, 125' East toward Scott Street; 3-B Scott Street.

   c. J.S. Ostby, Jr., 2795 Broad Street.

d. Street desired to be closed due to having never been used by anyone but applicant. Applicant desired that alley be closed because it allegedly bordered the applicant's property.

e. Planning Commission recommended conditional approval of closure. Conditions attached included ten-foot easement in Autumn Avenue centered on the sanitary sewer line.

2. a. June 28, 1971.

b. Louisa Street from 114.75 feet north of Saxon Street to south line of LeMoyne-Owen College property 304.75 feet south of south line of Walker Avenue.

c. LeMoyne-Owen College, 807 Walker Avenue.

d. Applicant desires to use property in connection with construction of new building. The building will cover part of the street in question.

e. Closure approved per resolution of City Council August 17, 1971.

3. a. 1968.

b. Benton Street from Woodland to Alice.

c. Supreme Mortgage and Realty Co., Inc., 588 Vance.

d. To meet setback requirements to the Mosby Woodland subdivision and to build single houses on property now occupied by unopened section of Benton Street.

e. December 19, 1968 closure approved by Planning Commission—dropped from City Council agenda November 4, 1969.

4. a. November 27, 1972.

   b. Portion of an alley 163 feet east of Cummings Street from south line of McLemore Avenue to 150 feet south to a point.

   c. Rev. Kneeland, 1251 Effie Road.

   d. Expansion of church building.

   e. Closed per resolution of Council dated July 3, 1973.

5. a. 1974.

   b. Humphrey's Place from south line of Vance Avenue 329′ east of east line of South Lauderdale Street to north line of Bowdrie Place.

   c. Vance Avenue Church of Christ, 585 Vance Avenue.

   d. Church desires to improve lot east of church structure and the subject portion of present alley as off-street parking facility.

   e. The Planning Commission on July 3, 1974 recommended that the closure be approved subject to certain conditions.

6. a. October 20, 1972.

   b. Ruth Street southside of Effie southwardly to north side of Mallory.

   c. Rev. H. O. Kneeland, Jr., 1251 Effie Road.

   d. Ruth has been closed from Elliston south to north line of Effie and there is no need for the street to be cut through from Effie to Mallory.

   e. Closed per resolution of City Council January 30, 1973.

The above information was obtained from the Street and Alley Closing files of the Memphis and Shelby County Planning Commission.

INTERROGATORY NO. 5

What laws, procedures, regulations, or ordinances govern the authority of the City of Memphis to require landowners to construct sidewalks, curbs, and gutters along their property?

ANSWER TO INTERROGATORY NO. 5

Defendants decline to answer this question on the grounds that any answer would constitute a legal conclusion on their part.

INTERROGATORY NO. 6

Does such law require the construction of such sidewalks, curbs, and gutters on that section of the City of Memphis in Hein Park known as West Drive?

ANSWER TO INTERROGATORY NO. 6

Defendants decline to answer this question on the grounds that any answer would constitute a legal conclusion on their part.

INTERROGATORY NO. 7

Does West Drive or any portion thereof have sidewalks?

ANSWER TO INTERROGATORY NO. 7

No.

INTERROGATORY NO. 8

If the answer to Interrogatory No. 7 is in the negative, why hasn't such construction of curbs, gutters, and sidewalks been compelled along West Drive?

ANSWER TO INTERROGATORY NO. 8

The City has not compelled the construction of sidewalks along West Drive due to the provisions of 36-104(a) and (c) of the Memphis City Code. The City of Memphis does not require residents along any existing street to construct curbs and gutters. Any such improvement would have to be part of the City's Capital Improvement Budget.

INTERROGATORY NO. 9

Has the City of Memphis or any of its agencies, over the last ten (10) years exercised any of its authority to compel landowners to construct sidewalks, curbs, and/or gutters?

ANSWER TO INTERROGATORY NO. 9

Yes.

INTERROGATORY NO. 10

If the answer to Interrogatory No. 9 is in the affirmative please provide the following; (a) the location covered by such action, (b) the date of such action, (c) the racial makeup, i.e. predominantly white, predominantly black, or other.

ANSWER TO INTERROGATORY NO. 10

While the City of Memphis Sidewalk Department does keep files on each street within the City of Memphis as to sidewalks which exist on them, there are no records cataloging which streets have been compelled to construct

sidewalks or when they were built. The only way such information can be gathered is to look through each individual street file to see if such sidewalk was compelled by the City and on what date it was built. The number of files one would have to inspect would number in the thousands.

If you or a member of your staff would care to inspect any or all of our sidewalk files we would be happy to make them available for your inspection.

Further, the particular files do not indicate the racial makeup of the neighborhoods. A list of streets where the City has recently ordered the construction of sidewalks during the past year has been compiled by Ed Cook of the Sidewalk Department strictly from his memory. We hope this list will be of some help to you. The streets involved are:

Richwood, Chiswood, Oak Meadows, Winston, Gregory, Riney, Lynchburg, Tessland, Kerwin, St. Elmo, Parkrose, Westmont, Hodge, [Levi], Millbranch, Gill, Floyd, Creston, Carrolton, Voltaire, Hester, Lexie, Bonnie, Favell, Delano, Whitney, Knox, St. Charles

INTERROGATORY NO. 11

Does the City of Memphis have in codified or other form, any procedures governing the requirements that must be met before a City street or any other city roadway or byway can be closed?

ANSWER TO INTERROGATORY NO. 11

All procedures governing the requirements that must be met before a City street can be closed have been provided during the prior depositions of Mr. Robert Miller and Paul Goldstein. (See exhibit attached thereto.)

INTERROGATORY NO. 12

If the answer to Interrogatory No. 11 is in the affirmative please identify such procedures by proper names and indicate whether such will be produced for Plaintiffs absent a Motion to Produce. If same will be produced without such a motion this question may be answered by attaching to your answer a copy of said document.

ANSWER TO INTERROGATORY NO. 12

Not applicable.

INTERROGATORY NO. 13

What is the predominate racial makeup of the Hein Park area in Memphis, particularly that section abutting on West Drive?

ANSWER TO INTERROGATORY NO. 13

White.

The undersigned, being first duly sworn, make oath that the facts stated in the foregoing Answers to Plaintiffs' Interrogatories are true to the best of their knowledge, information and belief.

/s/ Wyeth Chandler
Wyeth Chandler
/s/ Oscar K. Edmonds Jr.
Oscar Edmonds

(Jurat and Certificate of Service Omitted in Printing)

(Filed February 2, 1978)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title Omitted in Printing)

MOTION FOR LEAVE TO FILE A FOURTH AMENDED COMPLAINT

Plaintiff-Intervenors, through their attorney, respectfully move this Court for leave to amend their amended complaint filed on March 29, 1977 in the following particulars:

1. To amend Paragraph I to add the following sentence at the end of said Paragraph.

> The pendent jurisdiction of this Court is also invoked to request this Court to declare that the Defendants in this action did not follow the required State and local procedures in proceeding to close West Drive.

2. To amend Paragraph VIII of Plaintiff-Intervenors' Complaint filed March 29, 1977 to add the following prayer:

> That this Court exercise its pendent jurisdiction herein and grant the relief requested.

The reasons for the leave requested herein are set forth more fully in the memorandum attached hereto.

Respectfully submitted,

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
46 North Third Street
Memphis, Tennessee 38103
Attorney for Plaintiff-Intervenors

(Filed February 7, 1978)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

(Title Omitted in Printing)

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A FOURTH AMENDED COMPLAINT

Come now the defendants and in response to the Motion Filed by Plaintiff to Amend their Complaint for the fourth time state the following:

1. Defendants do not object to Plaintiffs amending their complaint for the fourth time so as to add the sentences set forth in paragraphs one and two of their motion.

2. Defendants contend, however, that Plaintiffs' allegation that the defendants did not follow the "required state and local procedures" in proceeding to close West Drive does not state a claim upon which relief can be granted.

3. Defendants are opposed to the suggestion that a hearing be held prior to the trial of this cause.

/s/ Charles V. Holmes
Charles V. Holmes
Assistant City Attorney

/s/ Michael C. Speros
Michael C. Speros
Assistant City Attorney

(Certificate of Service Omitted in Printing)

(Filed February 7, 1978)

IN THE UNITED STATES DISTRICT COURT FOR THE
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title Omitted in Printing)

SUPPLEMENTAL ANSWERS TO PLAINTIFFS' FIRST INTERROGATORIES

Come now the defendants and in answer to questions propounded by the Plaintiffs in their letters of December 29, 1977 and December 30, 1977 answer as follows:

INTERROGATORY:

Does the Defendant contend that there are in effect at this date laws, procedures, regulations, or ordinances governing the authority of the City of Memphis to require landowners to construct sidewalks, curbs, and gutters along their property?

ANSWER TO INTERROGATORY:

There are ordinances in effect which govern the City of Memphis' ability to require landowners to construct sidewalks. However, there are no such laws, procedures, regulations or ordinances in effect governing the authority of the City of Memphis to require landowners to construct curbs and gutters along existing streets and subdivisions. There is however an ordinance section which sets out requirements of what subdividers must provide in new subdivisions which deals with curb, gutters, and sidewalks.

INTERROGATORY:

Please identify those laws, procedures, regulations, or ordinances which the defendant contends govern the Defendants' authority to require landowners to construct sidewalks, curbs, and gutters along their property, or in lieu thereof attach copies of said procedures.

ANSWER TO INTERROGATORY:

The ordinance sections in effect which govern the City of Memphis' ability to require landowners to construct sidewalks include sections 36-96 through 36-158 of the Memphis City Code.

The section which deals with new proposed subdivisions is section 38-61 of the Memphis City Code.

INTERROGATORY:

Do the Defendants contend that the laws, procedures, etc. referred to in Interrogatory No. 5 require the construction of sidewalks, curbs, and gutters on that section of the City of Memphis in Hein Park known as West Drive?

ANSWER TO INTERROGATORY:

NO.

INTERROGATORY:

If the answer to the preceding Interrogatory is in the affirmative, please state why the Defendants have not compelled such construction.

ANSWER TO INTERROGATORY:

NOT APPLICABLE.

INTERROGATORY:

To what extent, if any, does the City rely on Section 36-97.1 of the Memphis City Code in the execution of its laws as far as sidewalk installation is concerned?

ANSWER TO INTERROGATORY:

If there are no sidewalks on a block of a street or if less than 25% of the residents have sidewalks, any request made that the street have sidewalks must go before the sidewalks Board to determine if sidewalks are necessary.

If however 25% of the residents on the block already have sidewalks, it is not necessary to bring the matter before the sidewalks Board when a request is made. Notices are sent to such property owners immediately upon a request for the remainder of the walks to be laid.

The undersigned, being first duly sworn, make oath that the facts stated in the foregoing Answers to Plaintiffs' Interrogatories are true to the best of their knowledge, information and belief.

Mayor Wyeth Chandler
Oscar Edmonds

(Jurat Omitted in Printing)

(Filed February 9, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

No. C-74-208

N. T. GREENE, et al.,
Plaintiffs,

vs.

CITY OF MEMPHIS, A Municipal Corporation, et al.,
Defendants.

PRE-TRIAL ORDER

Pre-trial conference before the Honorable Robert M. McRae, Jr., United States District Judge, on February 3, 1978.

Appearances for plaintiffs:

Mr. N. T. Greene, pro se,
1074 Terry Circle
Memphis, Tennessee 38107

Mr. A. C. Wharton, Jr.
Legal Services Association
325 Dermon Building
Memphis, Tennessee 38103

Appearances for defendants:

Mr. Charles V. Holmes
Mr. Michael C. Speros
City Hall #314
125 North Main Street
Memphis, Tennessee 38103

1. *Jurisdiction*

Jurisdiction of the street closing issue in this case was found to be present by the United States Court of Appeals for the Sixth Circuit in its opinion reported as *Greene v. City of Memphis,* 535 F.2d 976 (6th Cir. 1976). The Court held that Greene had stated a 42 U.S.C. § 1983 claim against all defendants except the City of Memphis and its Council. Therefore, as to that claim, subject matter jurisdiction exists under 28 U.S.C. 1343 (3).

In addition, the Court of Appeals found that Greene had stated a 42 U.S.C. § 1982 claim against all defendants, thus providing subject matter jurisdiction of that claim pursuant to 28 U.S.C. 1343 (4).

Although the Court has allowed plaintiffs to amend the Complaint with the issue pertaining to sidewalks, curbs, and gutters, the defendants contend that no jurisdiction exists as to this issue.

2. *Plaintiffs' Contentions*

In general, plaintiffs contend that they are:

(a) A class composed of black persons in the City of Memphis who own or stand to inherit property surrounding and adjoining the area along West Drive and Hein Park Subdivision.

(b) That on July 9, 1973, application was made by residents of the Hein Park Civic Association for closing a portion of West Drive.

(c) That the general area known as Hein Park in the City of Memphis, Tennessee, has been a white, well-to-do area, and that the white residents of said area with the support and acquiescence of defendant City officials and their predecessors in office have sought to preserve

the all white nature of said area free from all incursions into said area by black residents.

(d) The proposed dead-ending of West Drive by the defendant City is an unconstitutional violation of the rights of plaintiff-intervenors and the rights of those they represent under the Thirteenth and Fourteenth Amendments and under Sections 1982 and 1983 of the Civil Rights Act of 1866 and 1870, respectively.

(e) That the City of Memphis did not follow established procedural guidelines governing street closings, in that it did not provide a public forum where the "closing" could be discussed; and did not require that the "Application" contain the signatures of "all abutting property owners" to the area to be closed, as was required when the closing proceeding was commenced.

(f) That the closing of West Drive will bestow a benefit on the residents thereof in the nature of increased property values, solitude, and a better environmental quality in general, whereas said closing will be financially and psychologically detrimental to those discriminated against.

(g) That such closing would adversely affect the efforts of plaintiff-intervenors, those they represent, and others who have sought to perpetuate community involvement between the races.

(h) Plaintiffs and plaintiff-intervenors claim that the Court should:

(1) Grant plaintiff-intervenors and the class they represent a preliminary and permanent injunction enjoining defendants, their agents, employees, and those acting in concert with them, from maintaining discriminatory policies and practices against plaintiffs and the class they represent by the closing of West Drive.

(2) Grant plaintiff-intervenors and the class they represent a declaratory judgment that the acts, policies, and practices of defendants complained of herein violate the Thirteenth and Fourteenth Amendments to the United States Constitution and the provisions of 42 U.S.C. §§ 1982 and 1983.

(3) Grant plaintiff-intervenors and the class they represent a preliminary and permanent injunction enjoining defendants, their agents, employees, and those acting in concert with them from denying the plaintiffs the rights to inherit, purchase, lease, sell, hold, or convey real and personal property as is enjoyed by white citizens.

(4) Grant plaintiff-intervenors damages against the defendants to compensate for property value decreases.

(5) Grant plaintiff-intervenors judgments against the defendants and each of them jointly and severally, for punitive or exemplary damages.

(6) Award plaintiff-intervenors and the class they represent their costs herein.

(7) Award plaintiff-intervenors and the class they represent such further, additional, and different relief as the Court may deem just and proper.

3. *Defendants' Contentions*

(a) Defendants contend that on July 9, 1973, an application was made by residents of the Hein Park Civic Association for the closing of a portion of West Drive south of Jackson. After consideration by the Planning Commission, the matter came before the members of the City Council who approved a resolution closing a portion of West Drive.

(b) In general, the defendants contend there was no material variance from their established procedure in filing, processing, reviewing, and approving the application submitted to close a portion of West Drive. Further, the defendants contend that even if any variations in procedure may have occurred, without admitting that such did in fact, occur, such was not done with any racial intent, motivation, or purpose.

(c) Defendants contend that in other cases residents of black neighborhoods in the City of Memphis have applied for street or alley closings and that their applications were also processed according to established procedure. The benefits that accrue to those who live next to a closed street have been conferred on "black" streets as well as "white" streets within the City of Memphis.

(d) Defendants preserve their contention, which this Court rejected, namely, that the allegations made by the plaintiffs with respect to the issue of curbs, gutters, and sidewalks along West Drive has been previously determined against them when the United States District Court for the Western District of Tennessee, Western Division, dismissed for lack of jurisdiction these same allegations in *Greene, et al. v. City of Memphis, et al.*, Civil Action No. 74-565. Such ruling has a *res judicata* effect on the case at bar.

(e) Defendants also contend that the amended Complaint with respect to this issue fails to state a claim upon which relief can be granted because of the holding in *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed. 2d 438 (1971) *aff'g.* 419 F.2d 1222 (5th Cir. 1969) (*en banc*).

(f) Defendants contend that the traffic perils that would confront black citizens walking along West Drive would equally confront all other citizens who choose that

route for pedestrian travel. The absence of sidewalks does not discourage usage of the route by one race more than it does any other race.

(g) Defendants further deny that there is any legal requirement that sidewalks, curbs, and gutters be placed on West Drive or that the absence of them is in any way the result of racial motivations.

(h) Defendants contend that the individual plaintiffs neither have in the past, nor will in the future, suffer any compensable damages by virtue of the closing of West Drive or the lack of curbs, gutters, and sidewalks thereon. The principal thrust of the plaintiffs' claim is directed to the injunctive and declaratory relief sought.

4. *The Following Facts are Established by Admissions in the Pleadings or by Stipulation of Counsel*

(a) On January 29, 1934, a resolution was adopted by the Memphis City Council pertaining to a portion of West Drive.

(b) West Drive is made up of white residents.

(c) The purported owners of the two lots abutting the portion of West Drive sought to be closed, signed the application submitted to the Planning Commission.

(d) There are no sidewalks, curbs, or gutters along any portion of West Drive.

(e) The civil action brought by the plaintiff-intervenors through this Complaint for Intervention, as amended may be certified as a class action that meets the requirements of Federal Rules of Civil Procedure 23(a) and (b) (2).

(f) The monetary damage claims contained in the Complaint as amended are made on behalf of the individual plaintiff-intervenors and are not to be included as part of the relief sought on behalf of the members of the 23(b)(2) class, but said exclusion is not to preclude the seeking of such relief in other proceedings.

(g) The defendant City of Memphis is a political subdivision of the State of Tennessee and the Municipal Corporation and the other defendants are duly elected and acting executive and legislative officers, respectively, of the City of Memphis.

5. *Contested Issues of Fact*

(a) Whether the defendants, by closing West Drive, have conferred certain benefits on white residents of West Drive that they have refused to confer on similarly situated black neighborhoods because of their color.

(b) Whether a discriminatory purpose was a motivating factor in the decision of the City Council to close West Drive.

(c) Whether the defendants and their agents complied with the normal procedural sequence in processing the application to close a portion of West Drive. If not, the extent to which they failed to comply.

6. *Contested Questions of Law*

(a) Whether the plaintiffs will be denied equal protection and due process of law as guaranteed by the 14th Amendment of the United States Constitution as the result of the closing of West Drive.

(b) Whether under the decisions of the United States Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L.Ed. 2d 434 (1976) and *Village of Arling-*

ton Heights v. Metropolitan Housing Development Corporation, ... U.S. ....., 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977) the action of the defendants indicated that a discriminatory purpose was a motivating factor in their decision to close West Drive.

(c) Whether under the holding of *Palmer v. Thompson,* 403 U.S. 217, 915 S.Ct. 1940, 29 L.Ed. 2d 438 (1971) *aff'g* 419 F.2d 1222 (5th Cir. 1969) (*en banc*), the third Amended Complaint of the plaintiffs with respect to the issue of curbs, gutters, and sidewalks states a claim upon which relief can be granted.

(d) Whether the holding of the United States District Court for the Western District of Tennessee, Western Division in Civil Action No. 74-565 has a *Res Judicata* effect on the issue of curbs, gutters, and sidewalks being provided along West Drive in the case at bar.

(e) Whether under the ordinances, laws, and procedures of the City of Memphis, curbs, gutters, and sidewalks are required to be installed along West Drive.

(f) Whether any Order issued by the Court to the defendant requiring less than all the prayers set out heretofore, will adequately secure the rights of plaintiffs and those they represent under the Thirteenth and Fourteenth Amendments and the provisions of 42 U.S.C. §§ 1982 and 1983.

7. *Exhibits Which Will Possibly Be Received in Evidence by Both Parties Include*:

(a) A copy of the resolution of City Council passed on January 29, 1974, closing a portion of West Drive.

(b) A copy of a letter dated November 2, 1973, addressed to Frierson Graves from Ewing Johnson, re: Clo-

sure of West Drive at Jackson Avenue, File Number 73-27.

(c) A copy of a letter dated October 17, 1973, addressed to Mr. Paul Goldstein from I. R. Lendermon, Jr., re: Closure of West Drive at Jackson, # SAC 73-27.

(d) A copy of a City of Memphis Inter-Office Memorandum dated September 5, 1973, addressed to Paul Goldstein from J. W. Hubbard, along with a copy of attached comments contained in a City of Memphis Inter-Office Memorandum dated August 30, 1973, addressed to W. O. Crumby from J. C. Nutzell.

(e) A copy of a letter dated August 24, 1973, from Paul Goldstein to the attached mailing list. Copy reflects it was received by Maynard Stiles, Director of Sanitation, and contains handwritten notes at bottom from Danny Lemmons.

(f) A copy of a City of Memphis Inter-Office Memorandum dated August 23, 1973, addressed to Paul Goldstein from Danny Lemmons, re: Closure of Section of West Drive, near Jackson.

(g) A copy of a document entitled "Street Closing Recommendation" from South Central Bell, re: Closure of West Drive.

(h) A copy of a document entitled "Street Closing Recommendation" from Memphis Light, Gas & Water, dated 7-26-73, and marked "obsolete."

(i) A copy of a document entitled "Street Closing Recommendation" from the Fire Department dated August 21, 1973.

(j) A copy of a document entitled "Street Closing Recommendation" from Sanitation and marked "obsolete."

(k) A copy of a letter dated July 9, 1973, from Bill C. Weber, addressed to the Memphis and Shelby County Planning Commission with attached copies of:

1. A list of Residents along Blocks No. 87 and 91 of West Drive.
2. A signed application to close West Drive from Twenty-five (25) feet south of Jackson Avenue to Intersection of West Drive with south line of Jackson Avenue of said application, consisting of four pages.
3. A Certificate of Survey by Marvin H. White that gives a legal description of the portion of West Drive to be transferred to the abutting owner of the re-subdivided north part of Lot No. 77 in Hein Park Subdivision.
4. A Certificate of Survey by Marvin H. White that gives a legal description of the portion of West Drive to be transferred to the abutting owner of the re-subdivided north part of Lot No. 53 in Hein Park Subdivision.
5. A Table of Contents submitted for West Drive Street Closure.
6. A list of agencies with their designated representative and comments signed by Bill C. Weber.
7. A blueprint copy of a plat of the thoroughfare to be closed scale 1″ = 100′ along with a vicinity map of the area.
8. A blueprint copy of the proposed closure showing details of the barricade.
9. A blueprint copy of a detailed survey of the north 25 feet of West Drive in Hein Park Subdivision

showing the proposed Division of street property to residential lots.

10. Film transparencies of the copies contained in items 7, 8, and 9.

(l) A collective exhibit consisting of a copy of a City of Memphis Inter-Office Memorandum dated November 1, 1972, from Robert A. Fosnaugh to Bob Miller, with attachments thereto that comprise the file on a request for closure of certain streets in the Hein Park area.

(m) A copy of a document entitled "Thoroughfare Closure Procedure."

(n) Certified Copies of transcripts of Council proceedings on days pertaining to West Drive.

(o) Transparencies of vicinity map showing Hein Park Subdivision of surrounding area.

(p) Collective exhibit demonstrating traffic pattern at West Drive intersects with Jackson and North Parkway.

(q) Copy of map illustrating plan for channelization island for West Drive.

(r) Collective exhibits of Planning Commission files concerning applications by black areas to close streets or alleys.

Except as otherwise indicated, the authenticity of received exhibits has been stipulated, but they have been received subject to objection, if any, by the opposing party at the trial, as to their relevancy and materiality. If other exhibits are to be offered and their necessity reasonably can be anticipated, they will be submitted to opposing counsel as soon as possible prior to trial.

8. *Witnesses*

(a) Plaintiffs' witnesses:

1. Ms. Elnora Priest Cross (Intervenor)
2. Ms. Carolyn Burse (Intervenor)
3. Mr. Edwin Owens (Intervenor)
4. Mr. Harrel C. Moore and/or Mr. Samuel Peace (real estate brokers)
5. Dr. Robert [Feit] (Social Psychologist)
6. Spokesperson for [Vollintine] Evergreen Community Action Association (VECAA)
7. Mr. Robert Miller
8. Mr. Paul Goldstein
9. Answers to plaintiff-intervenors in interrogatories.

(b) Possible witnesses to be called on behalf of defendants include:

1. Robert H. Miller
2. Paul Goldstein
3. Ed Cook
4. Jimmy James
5. Jerry Cook
6. Bill Weber
7. J.S. Ostby, Jr.
8. Odell Horton
9. Rev. H. O. Kneeland, Jr.
10. Danny Lemmons.

(c) In the event that there are other witnesses to be called at the trial, their names and addresses and the general subject matter of their testimony will be reported to opposing counsel as soon as possible and prior to trial. This restriction shall not apply to rebuttal witnesses, the necessity of whose testimony cannot reasonably be anticipated prior to trial.

9. *Estimated Length of Trial*

The probable length of the trial of this case is three days.

ENTER: This 9th day of February 1978.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge
United States District Court

(Filed February 27, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

PLAINTIFF/INTERVENORS' POST TRIAL MEMORANDUM

INTRODUCTION

At the conclusion of arguments in this case on February 14, 1978 the Court invited the parties to file additional briefs outlining and summarizing their respective arguments and providing authorities in support thereof. This memorandum will summarize Plaintiff/Intervenors' contentions and will also provide previously omitted authorities in support of Plaintiff/Intervenors' pendent juris-

diction claims. Particular emphasis is given the Sixth Circuit's May 1976 ruling in that it appears that Defendants are attempting to portray that ruling in a very restrictive manner regarding what circumstances will allow the Plaintiff/Intervenors to prevail.

THE COMPLAINT

Plaintiff/Intevenors' Complaint in its final amended form asserts the following jurisdictional contentions:

1. That the rights of the Plaintiff/Intervenors and the class they represent were infringed in violation of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §1983 (Civil Rights Act of 1871).

2. That the rights of the Plaintiff/Intervenors and the class they represent were infringed in violation of the Thirteenth Amendment and 42 U.S.C. 1982 (Civil Rights Act of 1866).

3. That the Defendants in moving to close West Drive violated state and local laws governing the closing of public thoroughfares and that this Court, pursuant to its pendent jurisdiction, has the authority to redress such violations.

4. That as a part of Defendants efforts to preserve the all white makeup of West Drive, Defendants have refused to order the installation of sidewalks along West Drive.

THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This matter is before this Court on remand from the United States Court of Appeals for the Sixth Circuit, see *Greene et al. v. City of Memphis, et al.*, 535 F2d 976 (6th Cir., 1976). In remanding this case, the Court of Appeals stated:

We view Greene as having stated claims under 42 U.S.C. §1982 and 42 U.S.C. §1983. Section 1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, *Timson v. Wright,* ..... F2d ..... (No. 75-1300, 6th Cir., filed March 23, 1976) (slip opinion at 2), citing *Scheuer, supra,* 416 U.S. at 236, 94 S. Ct. at 1686, 40 L.Ed. 2d at 96, reasonably aver that the closing confers certain benefits, *to wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real propperty," on a less equal basis, than similarly situated whites who "hold" their "real property" subject to having the city confer the dead-end street benefit on their property. 535 F.2d (1076)

With regard to the 42 U.S.C. 1983 claim now asserted in this action, the Court of Appeals stated;

That Greene failed to specifically allege a section 1983 claim cannot preclude him from recovering on a section 1983 claim, should the allegations show and the proof support such a claim. See, e.g. *Janke Const. Co. v. Vulcan Materials Co.,* 527 F.2d 776-77 (7th Cir., 1976), aff'g 386 F. Supp. 687, 692 n. 3 (W.D. Wis. 1974); *Ailshire v. Darnell,* 508 F.2d 526, 528 (8th Cir., 1974); *Parr v. Great Lakes Express Co.,* 484 F.2d 767, 773 (7th Cir., 1973); *United States v. Martin,* 267 F.2d 764, 771 (10th Cir., 1958); *Dotschay v. National Mut. Ins. Co.,* 246 F.2d 221, 223 (5th Cir. 1957). We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those "person[s]"

> clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets. 535 F.2d

Inasmuch as the Complaint in Intervention specifically alleges a 1983 claim, there is no longer any issue as to the viability of such a claim. We, therefore, have a complete jurisdictional framework which would allow for the consideration of the theory suggested by the Court of Appeals or for other theories supportable under the logic used by the Sixth Circuit. More specifically, Plaintiffs are not without hope if, for the sake of argument they could not show that blacks have applied to have the streets closed but have been denied that right on the basis of race, whereas whites have been allowed to close their streets. The Defendants would have the Court rule that only in that instance could Plaintiff prevail. Under the theories enunciated by the Court of Appeals, Plaintiffs also can prevail if they can establish that their property rights as secured by 1982 have been violated by illegal government action in violation of 42 U.S.C. §1983. For example, and this will be treated in detail below, Plaintiffs could allege and will allege that they are holding their property on a less equal basis than whites because the Defendants, in violation of 43 U.S.C. §1983 and the Fourteenth Amendment Due Process Clause illegally permitted the closing of West Drive.

THE FOURTEENTH AMENDMENT AND 42 U.S.C. §1983 CLAIMS

Plaintiff/Intervenors have alleged that their rights as protected by the Fourteenth Amendment to the United States Constitution and by the Civil Rights Act of 1871, 42 U.S.C. §1983 have been violated by the Defendants' conduct in closing West Drive and the denial of sidewalks in that section of the City of Memphis surrounding West Drive.[1]

It is well established that 42 U.S.C. 1983 provides protection to all forms of property rights.

> This Court has traced the origin of §1983 and its jurisdictional counterpart to the Civil Rights Act of 1866, 14 Stat. 27. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 162-163, 90 S. Ct. 1598, 1611-1612, 26 L.Ed., 2d 142; *Monroe v. Pape*, 365 U.S. 167, 171, 183-185, 81 S. Ct. 473, 475, 481-483, 5 L. Ed. 2d 492. That Act guaranteed "broad and sweeping . . . protection" to basic civil rights. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 90 S. Ct. 400, 404, 24 L. Ed. 2d 386. Acquisition, enjoyment, and alienation of property were among those rights. *Jones v. Alfred H. Mayer*

---

1. *The Fourteenth Amendment. Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983. Civil Action for Deprivation of Rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> *Co.*, 392 U.S. 409, 432, 88 S. Ct. 2186, 2199, 20 L. Ed. 2d 1189.
>
> The Fourteenth Amendment vindicated for all persons the rights established by the Act of 1866. *Monroe, supra.* 365 U.S., at 171, 81 S. Ct., at 475; *Hague, supra,* 307 U. S. at 509-510, 59 S. Ct., at 961-962. "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." [*Shelley*] *v. Kraemer,* 334 U.S. 1, 10, 68 S. Ct. 836, 841, 92 L. Ed. 1161. See also, *Buchanan v. Warley,* 245 U.S. 60, 74-79, 38 S. Ct. 16, 18-20, 62 L. Ed. 149; H. Flack, The Adoption of the Fourteenth Amendment 75-78, 81, 90-97 (1908); J. [tenBroeck], the Antislavery Origins of the Fourteenth Amendment (1951).
>
> *Lynch v. Household Finance,* 405 U.S. 538, 31 L.Ed. 424 (1972)

The testimony in this case has established that Plaintiff-Intervenors stand to suffer greatly in the sense that their properties will be decreased in value if the proposed closing is allowed to take place. Plaintiff/Intervenors have also established that the motivating factor in closing West Drive was the desire of the white residents of Hein Park to keep "undesirables" out of the area. The only common sense meaning for the term "undesirable" as used here is to read it to mean the blacks who live North of the Hein Park area and who regularly traversed that area.

In addition to the rights directly related to property, however, Plaintiff/Intervenors have a right cognizable

under the Fourteenth Amendment that is separate and apart from what happens to their property. A similar right, if not identical, was recently considered by the Supreme Court in *Arlington Heights v. Metropolitan Housing Corp.*, ... U.S. ....., 50 L. Ed. 2d 450 (1977). The Court stated:

> Clearly M.H.D.C. has met the constitutional requirements and it, therefore, has standing to assert its own rights. Foremost among them is M.H.D.C.'s right to be free of arbitrary or irrational zoning action. At p. 463.

The decision to close the street in this case has all of the effects of the zoning action and, thus, should be restricted by the same governmental protections that emanate from the Fourteenth Amendment and 42 U.S.C. 1983.

a. The Equal Protection Clause

Plaintiff/Intervenors contend that the preferential treatment bestowed upon West Drive by the Defendants violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. At the outset we emphasize that we do not contend there has been a violation of the Equal Protection Clause simply because of disparate impact. Certainly, the disparate impact is of great relevance but it is not on that consideration alone that we rely. In asserting this argument we are guided by the decision of the Supreme Court in *Arlington Heights v. Metro Housing Corp.* ..... U. S. ....., 50 L.Ed. 2d 450 (1977), the Court stated:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purpose. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by

> a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.
>
> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.

We submit that there are many considerations that compel this Court to refrain from granting the Defendants herein the usual judicial deference. First of all, the closing of West Drive at its intersection with Jackson Avenue will cause more of a disruption to the black residents to the North of that intersection, both in terms of the actual disruption of traffic patterns, pedestrian traffic, and psychological ramifications. This was established by traffic studies now in the record and by the testimony of the Plaintiffs and their experts. However, we do not rest on this consideration alone. It was established quite clearly that this is the first time in the history of the City of Memphis that residents sought to close a street of the size and traffic density of West Drive for the reasons outlined in their petition. This, in and of itself, represents a marked departure from the ordinary course of business. Defendants feebly attempt to show that similar actions have been taken by audaciously presenting proof to the Court that it has also closed alleys and streets that were never reopened.

This is a comparison that simply will not wash. Defendants own testimony establishes that alleys and streets serve two totally different purposes and it is thus logical to conclude that different standards must be met in closing streets as opposed to closing a street that has never been open or a little used alley.

Also of paramount importance is the fact that the persons who initiated the proceedings to close West Drive made it clear that it was their purpose to keep black people from the North Memphis Area out of West Drive and Hein Park. Testimony to this end was not controverted. Defendants simply suggest that inasmuch as the City Council did not stress this motive, the Defendants cannot be held responsible for the racially discriminatory motives. This is not the law. The Supreme Court has stated:

> Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. *Shelley v. Kraemer, supra, Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 32 L. Ed. 2d 627, 637, (1972).

According to *Arlington Heights v. Metro Housing Corp., supra,* the proof adduced by Plaintiffs herein was in the least sufficient enough to shift to the Defendants the burden of establishing that the same decision regarding the closing of West Drive would have resulted even had there been no racial considerations whatsoever. *Supra,* P. 468, fn. #21. Obviously, the Defendants failed in this connection because by their own proof it was established that the request herein was so rare and unthinkable that similar actions had never been taken by the Defendants before. As noted above, the only effort toward meeting their burden of proof was to show that the City had closed

some alleys and streets that were dedicated but never paved or put into use.

There are other factors attendant to the proposed closing of West Drive here that support an inference of discrimination. Foremost is the fact that the Defendants failed to follow their own procedures in processing the application. The only sensible interpretation of the Defendants own written procedures is that all property owners abutting on the thoroughfare to be closed must sign the application. In this case this is more than a technical departure because the one individual who did not sign the application in fact objected to the proceeding throughout. Additionally, since the initiation of the petition, property ownership has changed numerous times and the procedures followed herein if allowed to stand would close West Drive without providing all residents thereof an opportunity to state their position. Also not to be ignored is the fact that one of the senior planners who worked on this application was a patient of the prime mover behind the closing of the street and yet this employee did not disqualify himself from processing this petition.

The arbitrariness and irrationality of the action taken here is patently clear. On one hand Defendants state that the street will remain open to pedestrians but in the next breath explain that it will belong to private parties free from public control except for the emergency vehicle easements. It isn't even clear who will maintain the mongrelized 24 foot strip in the center of the closure barrier.

The scenario presented by the activities surrounding the processing of this application are all but ordinary. The application in and of itself is a rarity. The leniency with which the application was treated both in terms of abutting owners' signatures and the consent of the concerned city departmental heads all established a marked departure

from the ordinary course of business. These factors when joined with the disparate impact on the black community add up to a clear deprivation of the Equal Protection of the law.

(b) *Denial of Due Process*

Plaintiff/Intervenors contend that they were denied their rights to procedural due process in the following particulars:

1. they were given no notice of the proposed closing,

2. they were not provided a meaningful hearing,

3. the processes followed in closing streets are not based on any clear standards, and

4. the procedures followed allow for irrational and arbitrary action by Defendants and their agents.

THE LACK OF NOTICE

Plaintiff/Intervenors and the class they represent received no official notice of the proposed closing of West Drive. Defendant Miller testified quite clearly that notice was not given and that persons affected could possibly hear of the proposed closing from neighbors or through newspapers. It is beyond question that this method of notification does not comply with the due process clause. On this point the Supreme Court has stated:

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected or entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 U.S. 233, 17 L.Ed. 531, 534. See *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914; *Hovey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215, 17 S. Ct. 841; *Grannis v. Ordean*, 234 U.S. 385, 58

L.Ed. 1363, 34 S. Ct. 779. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187.

Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed. 2d 556, 569, 570, 92 S.Ct. 1983 (1972).

Thus, it is clear that the Plaintiff/Intervenors' right to hold their property on an equal basis with whites was deprived without due process of law. No notice was given and no excuse was given for not providing any notice. This Court should, therefore, hold that in the least situations where persons are to be as seriously affected as the Plaintiff/Intervenors herein some form of official notice is required.

LACK OF HEARING

The procedures followed by the Defendants in processing the West Drive application did not provide Plaintiffs with a hearing as required by the Due Process of Law clause. It appears that most of the actions taken on the application were done for the most part by staff members of the Planning Commission and that when the application reached the City Council it was basically a rubber stamp action. Plaintiffs were not given an opportunity to appear at any of the Planning Commission hearings simply because of the fact that they did not receive a notice of such hearings. It is at these hearings that Plaintiffs could have challenged much of the technical information relied upon for the ultimate recommendation made to the City Council. To say that Plaintiffs were allowed to appear before the City Council in no way satisfies the constitutional requirement that a hearing be provided.

> The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L.Ed. 1363, 1369, 34 S. Ct., 779 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187 (1965).
>
> *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 299, 90 S.Ct. 1011 (1970).

LACK OF STANDARDS

Defendants' testimony confirmed that the Defendants have no clear, written or otherwise, specific standards to govern which streets can be closed. To deprive Plaintiff/Intervenors of their rights as was done here without such standards is a clear violation of the due process clause. Instructive on the question of the need for standards in any deprivation of property right is the case of *Kelly v. Metro Board of Education of Nashville*, 293 F. Supp. 485 (1968). That case involved the expulsion of a high school from participation in high school athletics. The expelled school contended that the procedures used to expel it violated the due process clause in that they did not contain clear and explicit standards governing its responsibility with regard to the alleged conduct which brought about its expulsion. The court agreed with the school's contention and in doing so stated:

> There are two separate considerations which lead this court to believe that the school board denied Cameron High School the protection of procedural due process. The first of these is the lack of pre-existing standards and regulations to structure any disciplinary action taken by the Board; . . . The imposition of penalties in the absence of prescribed standards

> of conduct is contrary to our basic sense of justice. . . Without some guiding standards the possibilities of arbitrary action are increased and individual interests are likely to suffer.

While the *Kelly* case dealt with the imposition of a penalty, in the end it still amounted to a deprivation of a protected right and, consequently, is analogous to the situation here. Plaintiff/Intervenors have been deprived of their property rights by a process that is completely without standards and open to arbitrary action. An example of this is the fact that while the Director of Police disagreed with the decision he deferred to the collective judgment of the petitioners which as we can see was very self centered and narrow. This Court should, therefore, not hesitate to declare that the procedures followed by the Defendants in acting on the West Drive application were violative of the Due Process requirement of explicit standards to govern any governmental deprivation of rights.

PLAINTIFF/INTERVENORS' RIGHTS UNDER 42 U.S.C. §1982

The testimony in this case established that if the proposed closing is allowed to take place, Plaintiff/Intervenors and the class they represent will hold their property on a less equal (or decreased value basis) from the way in which whites hold their property. Defendants have sought to downplay this by saying that the only way Plaintiff/Intervenors can prevail in this case is to show that blacks have applied to have streets closed but have not been allowed to do so because of their race. This is a very traditional reading of 42 U.S.C. §1982 and is not truly descriptive of that section's coverage. We contend that 42 U.S.C. §1982 prohibits the traditional form of discrimination as well as the more derivative or subtle forms

as would be visited upon Plaintiffs if West Drive is closed. Similar arguments were made in *Clark v. Universal Builders, Inc.*, 501 F2d 324 (7th Cir., 1974), a case involving alleged exploitation of blacks in the sale of urban real estate. In rejecting the Defendants' contention that the types of discrimination complained of in that case was not covered by §1982 the Court stated:

> Defendants contend that absent a showing of the traditional form of discrimination, namely, that defendants refused to sell to blacks because of their race, or offer to sell the same houses to whites at lower prices or on more favorable terms than they offer to sell to blacks, plaintiffs have not made out a case under §1982 . . . . We do not agree.
>
> At the outset we note that section 1982 is framed in broad yet clear language. It provides that:
>
> > All citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to . . . purchase . . . real property.
>
> Facially, therefore, the scope of section 1982 would appear to be rather far reaching; indeed such a reading of the statute is supported by the Supreme Court's interpretation of section 1982 in *Jones v. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed. 2d 1189 (1968).
>
> Defendants insist that section 1982 cannot be construed to encompass other than the traditonal type of discrimination, that is, that defendants offered to sell to whites on more favorable terms and prices than to plaintiffs. Keeping in mind the Supreme Court's admonition in *Lane v. Wilson*, 307 U.S. 268, 275, 59 S. Ct. 872, 876, 83 L.Ed. 1281 (1939), that the Constitution and statutes promulgated in its enforcement nullify "sophisticated as well as simple-minded modes of discrimina-

> tion," we reject defendants' notion of adherence to a strict, rigid, and traditional type of discrimination. We need not resort to a labelling exercise in categorizing certain activity as discriminatory and others as not of such character for section 1982 is violated if the facts demonstrate that defendants exploited a situation created by socioeconomic forces tainted by racial discrimination. Indeed, there is no difference in results between the traditional type of discrimination and defendants' exploitation of a discriminatory situation. Under the former situation blacks either pay excessive prices or are refused altogether from purchasing housing, while under the latter situation they encounter oppressive terms and exorbitant prices relative to the terms and prices available to white citizens for comparable housing.

The type of discrimination in this case is quite similar to that in Clark. It is not the traditional form of discrimination, yet it is discrimination in the sense that because of the Defendants' actions here, blacks will hold their property at a depressed value as compared to their white neighbors across Jackson Avenue. This subtle form of discrimination we submit is proscribed by Section 1982 and should be enjoined by this Court.

THE COURT'S EQUITABLE JURISDICTION

In closing argument, Counsel for Plaintiff/Intervenors urge this Court to enjoin this closing pursuant to its inherit equity jurisdiction. That this Court possesses such jurisdiction in vindication of federal rights is well established. The case of *United States v. Alabama* is in point. 304 F. 2d 583 (5th Cir., 1962). In that case the Court observed:

> Once Congress has visited jurisdiction of the cause in the district court, such court has, in the

absence of statutory limitations, all of the traditional powers and facilities of a court of equity. *Williamson v. Perry,* 8 HOW, 495, 12 L. Ed. 1170; *Sprague v. Ticonic National Bank,* 1939, 307 U.S. 161, 59 S. Ct. 777, 83 L.Ed. 1184. Where a federal statute establishes a general right to sue "federal courts may use any available remedy to make good the wrong done". *Bell v. HUD* (1946), 327 U.S. 678.

THIS COURT'S PENDENT JURISDICTION IN THIS CAUSE

Plaintiffs have amended their complaint to allege that this Court has the authority to correct the wrongs alleged here pursuant to its pendent jurisdiction. We contend that the Defendants have violated their own procedures and the law of the State of Tennessee in proceeding to close West Drive as proposed here.

First of all, the Defendants have applied an unrealistically narrow definition to the term "abutting owner" so as not to require the signature of all landowners on the section of the street to be closed. This is contrary to the common definition of "abutting owner" in street closing matters. Instructive on this point is the treatment given this subject in American Jurisprudence, 2d. That treatise contains the following statement:

> The term "abutting owner" when used in relation to highways, ordinarily refer to one whose land actually adjoins the way (*State v. Fuller,* 407 S.W. 2d 215), but the term is sometimes used loosely, without implying more than close proximity. *State v. Fuller, supra;* Cf. *LO-CACA Gathering Co., v. Missouri-Kansas-Texas R. Co.,* 476 S.W. 2d 732 (1972) and *City of Wichita Falls v. Thomas,* 523 S.W. 2d 312 (1975). 39 Am. Jur. 2d 160.

The Supreme Court of the State of Tennessee has made it clear that Courts in this state should inquire into the motives of a municipality for street closures where there has been an allegation of fraud or a manifest abuse of discretion. *Sweetwater Valley Memorial Park, Inc. v. City of Sweetwater,* 213 Tenn. 1, 372 S.W.2d 168 (1963). Plaintiff/Intervenors have alleged an abuse of discretion which approaches fraud and have adduced proof to substantiate these allegations. The burden now shifts to Defendants to rebut these allegations. Defendants have failed to do so.

CONCLUSION

For all of the foregoing reasons this Court should permanently enjoin the closure of West Drive and order that Defendants comply with their laws governing the required installment of sidewalks and order same installed along West Drive.

Respectfully submitted,

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
46 North Third Street
316 Dermon Building
Memphis, Tennessee 38103
(901) 526-5132
Attorney for Plaintiff/Intervenors

(Certificate of Service Omitted in Printing)

TESTIMONY OF [HARRELL] C. MOORE

[91] * * * estate business, would you describe West Drive as a dead-end street. More particularly for persons who are traveling north on West Drive. A. To me, with the closure of West Drive at that intersection, for those individuals traveling north on West Drive, it would create what is known in the real estate business as a "cul-de-sac"; a cove more or less.

Q. All right, and of course a cove indicating that it stops? A. That is correct.

Q. All right.

Now, Mr. Moore, in your opinion what would the placement of this cove or cul-de-sac, what effect, if any, will that have on the property values along West Drive; that section that is immediately affected by this closure? A. It would create more or less a Utopia within the city of Memphis. I think most of us have read with interest that individuals who have left the inner city for suburban living have since been coming back into the inter-city in certain choice locations.

The creation of a cul-de-sac in that immediate area would produce a little haven for those individuals who happen to be property owners in that area with [92] providing all of the amenities of a closed neighborhood, as such. I would think that the property values in that neighborhood would be enhanced greatly.

Q. Now, Mr. Moore, what effect, if any, would this proposed closure have on the property values in the Springdale area; just across Jackson there? A. I am intimately familiar with the Springdale area, having been a real estate agent who more or less was instrumental in providing some houses for those in low economic groups in that area.

From an economic standpoint there would not be a lessening of value in those properties in the Springdale

area, but from a psychological standpoint, it would have a tendency to have a demoralizing—

Mr. Holmes: (Interjecting) I object to that answer. He is not qualified as an expert in psychological opinions.

Mr. Wharton: Well, if he would like to strike that whole answer, we don't have a problem with that.

Mr. Holmes: Well, we only object to the psychological evaluation. He has stated that the property values in and of themselves would not go down.

* * *

[95] The Court: Right.

Mr. Wharton: From his real estate background.

Q. (By Mr. Wharton) Would you please continue with your response, Mr. Moore? A. In my opinion, with the 17 years experience in the real estate industry, psychologically it would have a deterring, depressing effect on those individuals who might live north of the Hein Park area. With the closure of the street, the creation of another little haven, the fact that these people are in a lower economic social group and wouldn't be able to actually afford housing with the illustrious price tags of those houses in the Hein Park area, it would be, in my opinion, like the individual looking in the pastry store who doesn't have a dime and who can't afford it. And consequently, as a result of such, their moralistic values on their properties could tend to be such that the upkeep would not be nearly so great and it could have a detrimental effect on the property values in the future.

Mr. Wharton: No further questions.

Mr. Holmes: I have no questions.

The Court: All right.

Thank you, Mr. Moore.

[96] (Witness excused.)

Mr. Wharton: We would like to call Dr. Marvin Feit.

TESTIMONY OF MARVIN FEIT

DR. MARVIN FEIT

The said witness, being first duly sworn, testified as follows, to-wit:

Direct Examination

By Mr. Wharton:

Q. Would you state your name, please. A. Marvin Feit.

Q. What is your address, Mr. Feit? A. My home address?

Q. Both. A. My home address is 1551 Cordova, Germantown. My work address is the University of Tennessee doing social work, 1246 Union here in Memphis.

Q. You are employed at the University of Tennessee; is that correct? A. Yes.

Q. How long have you been employed there, Dr. Feit? A. A year and a half.

Q. In what capacity are you employed? A. I have been employed as an assistant professor in Planning and Administration, in community organization and also this year I have been a clinical assistant professor in the Department of Psychiatry, University of Tennessee Center of Health Sciences.

Q. And where were you employed before then? [98] A. I was doing consulting work, and also employed at the University of Minnesota.

Q. What is your educational background, Dr. Feit? A. I hold a Ph D. in social work from the University of Pittsburgh, a Master of Science in Public Health from the University of Pittsburgh, a Master of Science from Columbia University in social work and a B.S. degree from Brooklyn College in New York.

Q. Do you have any publications to your credit, Dr. Feit? A. Yes.

Q. Would you list some of those, please? A. Well, I recently just had one published on *American Indian Family Behavior and Implication of Social Work Practice,* health care among the American Indian community. Notes relative to community organization, a workshop done in Minneapolis, Minnesota and work done on reviewing small group work, research relative to social work practice. And presently I have a publication, a book that is coming out, the Management of Administration of Drug and Alcohol Programs. And several other small publications that I have done at workshops and conferences on community organization in Pittsburgh, in Erie, Pennsylvania, in Minneapolis, Minnesota; in New York City.

TESTIMONY OF SARAH TERRY

[140] The Court: Other streets.

Q. (By Mr. Wharton) Other streets in the city of Memphis.

Mr. Wharton: Thank you, Your Honor.

A. The only way that it would pose a unique problem would be that we do not have sidewalks. So that the children and everybody has to walk in the streets.

Q. Were you approached by anyone who asked you to sign this petition? A. Yes.

Q. Did they give you any reason as to why they would like to have you sign their petition? A. That there was excess traffic on the street and it was dangerous for children. It was my understanding that trash was thrown out of windows of cars and stuff like that so it made our street littered.

Q. Based on what was told to you during those encounters, did you gain the impression that there was any

racial consideration? A. At one point someone said to us; the person who was passing the petition, that the traffic on the street was undesirable traffic. And I did not ask what that person meant.

[141] Q. Did they make any reference to the people of North Memphis? A. Just the people coming through Hein Park.

Q. How did they describe them? A. This was just one statement, that the traffic was undesirable traffic. But now, you see I did not ask a question to pursue that.

Q. Did anyone from the Planning Commission or anywhere come back and ask you if you wanted to join any petition after it reached the Planning Commission office? Did anyone from that office ask you if you wanted to sign the petition? A. No.

Q. Did they send you any type of notice regarding the closing of the street? A. I honestly do not remember. I don't recall any.

Q. One last question. You are here under subpoena; is that correct? A. Yes.

Mr. Wharton: I have no further questions at this time.

The Court: Mr. Holmes?

[142] *Cross Examination*

By Mr. Holmes:

Q. Mrs. Terry, did you attend the City Council meeting on January 29th, 1974? A. Yes, I did.

Q. And at that time what was your reason for being there? A. My reason for being there was that we were opposed to closing the street and we needed to say so.

Q. Did you speak before the City Council on that day? A. Yes, I did.

Q. Weren't you in fact the first speaker to speak in opposition to the closing of West Drive? A. Perhaps I was. I don't remember what order.

Q. And at that time did you identify yourself as Sarah Terry? A. Yes, I did.

Q. That you lived on West Drive? A. Yes.

Q. Who did you buy your house from on West Drive? A. Dr. Ruth Dinkins.

Mr. Holmes: I have no further questions.

Mr. Wharton: Do you have any * * *.

TESTIMONY OF ROBERT MILLER

[148] * * * the city and five respectively from the county composed the Memphis and Shelby County Planning Commission and served without any compensation.

Q. Now, what was your official relationship with the commission? Were they your supervisors or what? A. Yes. We actually worked for them to bring to them all of the pertinent applciations to these hearings. They were charged with considering them and our old staff would bring all of these matters to them for action and the action would be a recommendation to the respective city and county bodies.

Q. Then during your tenure as director, did you receive an application to close certain sections of West Drive? A. Yes.

(Thereupon, Exhibit Number 13 was passed to the witness.)

Q. (By Mr. Wharton) Mr. Miller, I show you this document. Does that document before you now include part of the package that went along with the application to close West Drive; or that you received with that application? A. I'll say yes, this went along with the applciation.

Q. I would ask that you read the top of that there. [149] A. (Reading.) "Procedure for filing street and alley

closing." There are 10 items and item three indicates, "All abutting property owners must indicate their approval by signing the application form. Spaces for this purpose are provided. Additional owners may sign additional application forms which are marked on the sheet." A blank or blanks are provided.

Q. Now, Mr. Miller, let us turn to the application that was submitted regarding West Drive.

Can you identify that document before you as the application submitted to close West Drive? A. Yes. This is our form, the petition that we give to prospective applicants who wish to close streets or alleys.

Q. All right.

I ask you again Mr. Miller, to read this entry here (indicating) that appears on the actual application sheet. A. (Reading.) "All owners abutting the thoroughfare to be closed must sign the application."

Mr. Wharton: Now, this is Exhibit Number 13, Your Honor.

The Court: All right.

Q. (By Mr. Wharton) Now, Mr. Miller, I will ask you to scan those; I believe it is four pages of [150] signatures there and ask you if you see the name or the names of Mr. Fred Terry or Mrs. Sarah Terry of 732 West Drive.

(Witness scanning document as requested.)

A. You say Sarah Terry?

Q. Yes, sir. A. I don't believe so of anybody that signed in their own handwriting. To the best of my ability, I don't see anything that looks like the name Sarah Terry.

Q. Now, Mr. Miller, during the processing of this application did you receive any information that a Mr. Fred Terry and/or Mrs. Sarah Terry objected to the closing of West Drive? A. Yes. I recall that a Mr. and Mrs. or one of the Terrys wrote us a letter saying

that they owned property on that street that they recently acquired and they wanted us to acknowledge that they were not a party to the application.

Q. I would like to show you Exhibit Number 19.

(Thereupon, Exhibit 19 was passed to the witness.)

Do you recall having reviewed that document before? A. Yes.

[151] Q. And is that the letter that your office received from Mrs. Terry? A. Yes. Mr. Goldstein was on that staff.

Q. Now, what action, if any, did you take in response to this letter, Mr. Miller? A. As you pointed out and as we just discussed, the requirements for an application addresses itself to the abutting property owners. They must sign the application.

I interpret abutting to be immediately adjacent to the land that we are going to close. The portion of the street that we are going to close.

In the case of this application we were entertaining the closure of the south—a distance of approximately 25 feet south of Jackson Avenue, which would require, according to our rules; which would require the abutting property owners to sign the application. In this instance, in this case it required the two corner properties; the southwest corner of West Drive and Jackson and the southeast corner of West Drive and Jackson. The other names on the application are just names on the application. It is not a requirement because we are not closing West Drive for its entire length or anything of that nature. We are closing 25 feet and we require those people who [152] own and abut that 25 feet.

Now, when Mrs. Terry wrote us and said that she doesn't want to be a party as she says in this letter to Mr. Goldstein. Had she been the abutting property owner at the corner and said I want to withdraw and not be

a party to the closure abutting my property, then I would have had to take action to do something with that application. She owns property down the street. We are not closing West Drive down the street. We are closing it at the intersection. We appreciated her letter and I think we acknowledged it but she was not a party to the case at hand. We were not closing West Drive in front of her property. We were closing West Drive up near Jackson. So, it did not affect the application as far as I could determine.

Q. And pursuant to that interpretation, Mr. Miller, the owners of lots 53 and 77, as shown on Exhibit 18, could have—let me go back in case you have forgotten the first part of my question.

To your interpretation of your procedures, the owner of lots 53 and 77 could alone have closed West Drive? A. Absolutely, that is correct. The other names on the petition are just names that we don't require. Maybe it was just part of the situation that the [153] applicant wanted to get these people, maybe the majority to agree or to disagree.

The only requirement in any street or alley closing that we have to follow are the requirements that the abutting property owners, abutting the thoroughfare to be closed, they must sign the application.

Q. All right.

Mr. Miller, in your experience as planning director you have closed other streets; is that correct? A. Oh, yes. We have closed many streets and alleys in Memphis and Shelby County.

Q. How long have you been in this planning business in some capacity? A. More years than I would like to tell you but I would say for 20 years.

Q. Now, during that 20 years, what is the largest number of abutting property owners pursuant to your

interpretation. Just an approximate number that you had in signing an applciation. A. Well, we get both street and alley closings. I think we get more if you want to close an alley, if people want to get an alley closed and of course they would like to fence it so they petition to close an * * *.

* * *

[200] Number two is "dimensions of the thoroughfare".

Number three, "dimensions of the property abutting the thoroughfare".

Number four, "ownership of the abutting property".

Number five, "ownership lines in an area 300 feet to either side of the thoroughfare. Names of owners beyond those abutting thoroughfares need not be shown".

Q. All right, and in connection with that, sir, did you receive—I think you have already got 13 up there, haven't you? A. Yes.

Q. Which is the application. And does it have the maps attached to the back of it?

(Witness reviewing Exhibit 13.)

A. The maps are on Exhibit 18.

Q. No. They are maps that go on Exhibit 13.

Mr. Wharton: I don't have any maps.

Mr. Speros: This is also part of 13. It is submitted with the application.

(Thereupon, the above-described map was passed to the witness.)

Q. (By Mr. Speros) Would you open that up, please, sir, and look at the plat, which is one inch equals 100 [201] feet.

Am I correct, sir, that it shows as abutting owners, the names only of the people who own lots 53 and 77? A. Yes, it has their names.

Q. And the other lots down the extension of West Drive are only indicated by lot number; is that correct? A. Yes.

Q. And that is in compliance with your thoroughfare closing procedure; isn't it? A. Yes, sir.

Q. Thank you.

On page two of the thoroughfare closure procedures. Do you have that document in front of you. It is Exhibit 15. A. Yes.

Q. Would you read, not the last paragraph but the two immediately above that, sir? A. (Reading.)

"An application for a street and alley closing is in effect a request to acquire city-owned property. Therefore, the street or alley should be appraised for its fair value with the * * *.

* * *

[204] * * * have a staff member. Perhaps myself or somebody else on the staff, present at the City Council hearing on the Tuesday afternoon meetings. When this matter is called we will talk about the location, what is the specific request, who will give the Planning Commission recommendation, and the reasons for that recommendation.

And then we sit down and the chairman of the council will hear from the applicants. If there is opposition, he will hear from the opposition. They could question the applicant, question the opposition, question the staff. And ultimately they will vote on the matter.

Q. All right.

So, even if perhaps the staff had recommended against a particular closure, once the Planning Commission takes action, you then before the council represent the Planning Commission's position. Is that correct? A. That is correct.

Q. All right, sir.

What was the motive of the Planning Commission in recommending the closure of West Drive? A. Well, it was really not a motive. It was to go ahead and process the application. The rationale for the favorable recommendation was as we indicated [205] earlier, that we had to weigh between the people along West Drive wanting to have a tranquil mid-town subdivision; and trying to cut off some of the traffic. But having it tranquil as a single-family neighborhood as weighed against allowing the through traffic to go down to North Parkway and then negotiate a turn east or west. Bear in mind that West Drive terminates at the Parkway. It doesn't go any further south. The park is in the way. You cannot get into the park at West Drive and Parkway.

So, if you close it at Jackson, then you would be telling motorists instead of going east and west down at Parkway, you may travel east and west on Jackson Avenue. And by closing the intersection there, there is ample access into the subdivision by those other streets, which I am sure you are all familiar with. Cypress Drive, Charles Drive. A little further to the east is Trezevant, which becomes East Parkway and then turns into Airways and you can go all of the way down to Mississippi by just going a block or two east.

Likewise, if you went to the west you can get over to McLean. McLean is a major north-south street. It takes you into the Overton Park entrance. It takes you down into Lamar and all points south and to the * * *.

CLOSING ARGUMENTS AND COMMENTS OF COURT

* * *

[321] * * * City is that they only require that the people who are going to receive the benefits sign. That issue only has to be fitted to the fact that this is the first time that the Planning Commission has even ended up using this procedure to cut down the traffic on a street. Now, that regulation and that instruction is not controlling. It is merely a question of getting the matter before the Planning Commission and you have some problems about what kind of notice you were going to give them. But notice apparently was given in this case.

Mr. Speros: Well, I—

The Court: (Interjecting) I understand that most of the street closings that we saw today offer situations where the street hadn't even been opened. Yesterday we talked about standards. I started to think, "Well, you can't close a street before it has been opened", but I think you can. It is whether it has been dedicated. So often these things involve a plat and no more where a subdivider put his street in the wrong place and he has to come along and boy is he mad when he has to pay money they are going to put the street in some place else.

But, this is unprecedented.

[322] Mr. Speros: Well, that is true. It is a unique case. I agree with Your Honor it is a unique case. But, I don't think that makes it necessarily a violation of local law.

The Court: I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years; the Hein Park

Civic Club. They tried to keep all of the people north of Jackson from coming through there and that didn't work. So, now somebody; I don't know who it was, has come up with this clever idea that if we can get the two people on the corner to—I would be interested to know who is going to pay the eight hundred dollars. If we get those two people to agree and lend us their names, we can stop these people to the north.

Mr. Speros: You can make an application.

The Court: Right. You can make an application. And that is what we are faced with here.

Now, the problem is we have got to try to fit it in with what the Court of Appeals says the law is. And I agree with one of the points you are making, that how in the world am I going to compare the only time it has ever happened whether they are [323] doing it for blacks or whites.

Mr. Speros: Well, Your Honor, we can't make cases. I mean we had to go to the files and find out what have we done in black neighborhoods. These were the fact situations that we came up with and the question is did the Council act with racial intent or motivation in this case and are they conferring benefits here that they don't give elsewhere. It is not the same benefit, I agree. But, when blacks have come before the Council and wanted to close their streets for whatever reason they listed on their application, they have been treated the same way. That is what the gut issue in this lawsuit is, whether they are receiving differential treatment or not. Not whether they are going to be inconvenienced or whether it is going to throw extra traffic onto their street or not.

The Court: I don't think that you can compare the closing of a part of an alley in an all black neighborhood to a situation where an all white neighborhood is seeking

to stop the traffic from an overwhelmingly black neighborhood from coming through their street.

Mr. Speros: Well, Your Honor, there has been no proof that it is an overwhelmingly black neighborhood [324] to the north.

The Court: Have you been out there?

Mr. Speros: I used to live out there.

The Court: Used to, you don't now?

Mr. Speros: Well, Sir, I lived on Overton Park which is just south of there just—

The Court: (Interjecting) I'm talking about Springdale. Coming across there. You don't think that is predominantly black?

Mr. Speros: I am saying that there was no proof introduced to that effect, Your Honor. If you want to take judicial notice of it.

The Court: I will take judicial notice of the fact that that is one of the areas that—we use the word "predominantly". I am sure that it is not all black. Predominantly is kind of a delicate word. Hein Park is not predominantly white, it is white.

So, if the City Council didn't know that that property coming up to Jackson Avenue was predominantly black, then I have got my doubts about them.

Mr. Speros: Well, Your Honor, I am not—

The Court: (Interjecting) And if they don't see the awkwardness of this to that black community, * * *.

TRIAL EXHIBITS 1 & 2

RESOLUTION

WHEREAS, the owners of the property abutting on the hereinafter described thoroughfare have petitioned the Council of the City of Memphis to officially close same; and

WHEREAS, the owners of the property abutting on the hereinafter described thoroughfare have agreed to pay the City of Memphis a contribution in the amount of $800.00 for the closing of said thoroughfare; and

WHEREAS, said portion of the hereinbelow described thoroughfare, lying and being situated in Memphis, Shelby County, Tennessee, to be closed is more particularly described as follows:

> BEGINNING at a point in an extension of the south property line of Jackson Avenue where said property line crosses the north end of West Drive, said beginning point being 37.92 feet west of the northwest corner of the re-subdivised north part of Lot No. 77 in Hein Park Subdivision, as measured along said extension of the south property line of Jackson Avenue and running thence westwardly along said extension of property line 37.92 feet to the northeast corner of the re-subdivided north part of Lot No. 53; thence southwardly along the west property line of West Drive 26.1 feet to a point; thence eastwardly along a line 25.0 feet from and parallel with Jackson Avenue 37.92 feet to a point in West Drive; thence northwardly and parallel with the west property line of West Drive 26.1 feet to the point of beginning.

and

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Memphis that a portion of West Drive,

from the east right-of-way line of Jackson Avenue extending 26.1 feet southwestwardly, described hereinabove, be, and the same is, hereby closed for public use, to be improved in accordance with the plans and specifications of engineer Marvin White as submitted in the application and with an easement for fire hydrant use.

BE IT FURTHER RESOLVED that the Mayor of the City of Memphis be, and he is, hereby authorized to execute quitclaim deed to the owners of the property abutting on the above described thoroughfare, specifically reserving for the Memphis Light, Gas and Water Division a permanent easement over and on the above described property.

BE IT FURTHER RESOLVED a minimum of 24 feet clearance with no obstruction other than the rolled curbing as submitted and the normal type of rolled speed breaker on the above described property will be provided by the abutting property owners.

BE IT FURTHER RESOLVED that a performance bond or cash in an amount satisfactory to the Public Works Department of the City of Memphis be given with surety to insure the City of Memphis that the improvements provided for in the application will be constructed.

BE IT FURTHER RESOLVED that a copy of this resolution be sent to the Memphis Abstract Company, the Security Title Company, the Mid-South Title Company, the Memphis Title Company, the County Tax Assessor's Office and the Assessment Review Office.

Printer's Note: Trial Exhibit 2 is same document only reconsidered and adopted Feb. 5, 1974. /s/ P.T.

I hereby certify that the foregoing is a true copy and said document was adopted, approved by the council of

the City of Memphis in regular, special session on the Jan. 29, 1974.

/s/ Pauline B. Temple
Deputy Comptroller Council
Records

TRIAL EXHIBIT 3

RESOLUTION

WHEREAS, it has been brought to the attention of the Council that a resolution passed originally by Council on January 29, 1974, reconsidered and passed again on February 5, 1974 to close a portion of West Drive at Jackson Avenue incorrectly stated the portion to be closed and the property to be deeded to abutting property owners; and

WHEREAS, the Council desires to correct this error in description and to reaffirm its action in closing a portion of West Drive at Jackson Avenue.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Memphis that the resolution heretofore approved on February 5, 1974 be amended to correct the legal description of said portion by deleting the legal description contained therein and by substituting the following legal description in order to more particularly describe the thoroughfare to be closed:

> BEGINNING at a point in the southerly right-of-way line of Jackson Avenue at its intersection with the westerly right-of-way line of West Drive; thence southwardly along the westerly right-of-way line of West Drive a distance of 26.1 feet; thence eastwardly, parallel to and 25 feet south of the southerly right-of-

way line of Jackson Avenue a distance of 83 feet more or less to a point in the easterly right-of-way line of West Drive; thence northwardly along the easterly right-of-way line of West Drive a distance of 25 feet more or less to a point of intersection of the easterly right-of-way line of West Drive with the southerly right-of-way line of Jackson Avenue; thence westwardly along an extension of the southerly right-of-way line of Jackson Avenue a distance of 75.84 feet to the point of beginning.

BE IT FURTHER RESOLVED that all other provisions in the said resolution be and they are hereby affirmed.

I hereby certify that the foregoing is a true copy and said document was adopted, approved by the council of the city of Memphis in regular session on Jan. 31, 1978.

/s/ Paul N. Arnett
Comptroller

TRIAL EXHIBIT 4

MEMPHIS AND SHELBY COUNTY
PLANNING COMMISSION

City Hall 125 North Main Street
Memphis, Tennessee 38103 Telephone 534-9626

November 2, 1973

Mr. Frierson Graves
City Attorney
3rd Floor City Hall
Memphis, Tennessee 38103

RE: Closure of West Drive at Jackson Avenue File Number 73-27

Dear Mr. Graves:

The Memphis and Shelby County Planning Commission, at its regular meeting on November 1, 1973, recommended that the above mentioned closure be approved as submitted with the following conditions:

(1) Applicant either pay relocation costs for existing Memphis Light, Gas & Water facilities *or* provide easements for existing and future utilities.

(2) Fire Department will require a minimum of 24 feet of clearance with no obstructions other than the rolled curbing as submitted and the normal type of rolled speed breaker.

This recommendation supercedes [sic] a previous recommendation (October 4, 1973).

I am enclosing a copy of the entire Planning Commission file (correspondence, legal description, application form, survey, etc.) pertaining to this matter. The ap-

plication was submitted by the Hein Park Civic Association, whose principal spokesman has been Dr. Bill Weber (782 West Drive).

Please present this matter to the City Council for their consideration. If you have any questions, please call me at 634-3630.

Sincerely,

/s/ Ewing Johnson
Ewing Johnson
Senior Planner

EJ/cmr

cc: Bill Weber M. D.
Marvin White
Mr. & Mrs. Fred H. Terry
Clay Huddleston
Pauline Temple

TRIAL EXHIBIT 13

Hein Park Civic Association
Hein Park Subdivision
Memphis, Tennessee 38112

July 9, 1973

Memphis and Shelby County Planning Commission
125 North Main Street
Memphis, Tennessee 38103

Dear Sirs:

Enclosed is a petition with supporting documents asking for the closure of West Drive at Jackson Avenue. The Hein Park Subdivision lies in the heart of the city bounded by high density traffic arteries, e.g. Trezavant, North Parkway and Jackson Avenue. We, the residents of the Hein Park Subdivision, feel that steps to curtail the use of subdivision streets for through traffic is essential if this area is to be preserved as a midtown residential section. In August 1970, a petition to close several streets in our subdivision was presented to and rejected by the City of Memphis Traffic Engineering Department. In the report of Mr. Robert A Fosnaugh concerning this matter, he advised, "From a practical stand-point giving consideration to the many points raised heretofor, it appears that merely closing West Drive at Jackson would eliminate a major portion of the through traffic using subdivision streets, thereby achieving most of the original objective of the proposal." It is upon that recommendation and advice that this petition is presented.

Attached to this letter is a list of agencies with their designated representative with whom we have discussed our proposal. Their comments concerning this closure may be noted.

We sincerely appreciate your consideration of our petition.

Very truly yours,

/s/ Bill C. Weber
Bill C. Weber, M.D.
Street Project Chairman
782 West Drive
Memphis, Tennessee 38112

Hein Park Civic Association
Hein Park Subdivision
Memphis, Tennessee 38112

Table of Contents Submitted For West Drive Street Closure.

1. Signed application - 4 sheets - 6 copies each page.
2. Six copies of plat with vicinity map.
3. Six copies blueprint of proposed closure.
4. Six copies detailed survey of portions to be conveyed to adjoining property owners.
5. Six copies legal description of street and portions to be conveyed to adjoining (two) property owners.
6. Sepia prints of plat, blueprint and detailed survey.
7. Letter of introduction - 6 copies.
8. Application fee of one hundred dollars ($100.00).
9. List of residents Blocks 87 and 91 West Drive - 6 copies.

Hein Park Civic Association
Hein Park Subdivision
Memphis, Tennessee 38112

West Drive Residents Blocks No. 87 and 91

Mr. & Mrs. J. K. Gurley	820 West Drive
Mr. & Mrs. Leo Schlesinger	821 West Drive
Mr. Albert Johnson	815 West Drive
Mr. & Mrs. Elred L. Webb	807 West Drive
Mr. & Mrs. E. Paul Jones	799 West Drive
Mr. & Mrs. William E. Sharp, Jr	787 West Drive
Mr. & Mrs. B. A. Birmingham	777 West Drive
Mrs. Rachael M. Baker	767 West Drive
Mrs. J. W. Owen	757 West Drive
Mr. & Mrs. J. Poston Cox	747 West Drive
Mr. Charles T. Everts	737 West Drive
Mr. & Mrs. Richard C. Wells	727 West Drive
Mr. & Mrs. John B. Thomas	717 West Drive
Mr. James S. Doyle	707 West Drive
Mr. & Mrs. Lloyd Stern	697 West Drive
Mr. & Mrs. Henry L. Graham	706 West Drive
Mr. & Mrs. William C. Womack	714 West Drive
Mrs. Melvyn A. Levitch	722 West Drive
Dr. Ruth E. Dinkins	732 West Drive
Mrs. John Fitzgerald	742 West Drive
Mr. & Mrs. Paul Lemm	754 West Drive
Mrs. Mary H. Fulton	764 West Drive
Dr. & Mrs. Roland Carter	774 West Drive
Dr. & Mrs. Bill C. Weber	782 West Drive
Mrs. N. W. Gill	792 West Drive
Mr. & Mrs. Larry Lacy	812 West Drive

Mrs. Fred Terry bought this house on April 18, 1973

APPLICATION TO CLOSE STREETS OR ALLEYS

Memphis and Shelby County Planning Commission

CITY HALL • 125 NORTH MAIN STREET • MEMPHIS, TENNESSEE 38103 • TELEPHONE 527-6611

I (We) hereby request the closing of the following street(s) or alley(s):

West Drive

Beginning at: Twenty-five (25) feet south of Jackson Avenue

Ending at: Intersection of West Drive with south line of Jackson Avenue

Reason for request: (1.) Reduce flow of through traffic using subdivision streets.

(2.) Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School. (3.) Reduce traffic pollution" in a residential area, e.g. noise, litter, interruption of community living.

(ADDITIONAL REASONS MAY BE GIVEN ON A SEPARATE SHEET)

Name of Applicant: Hein Park Civic Association, Bill C. Weber, M.D.

Address: 782 West Drive | ZIP: 38112 | PHONE: 452-0310

NOTE:

THE CITY OF MEMPHIS RESERVES THE RIGHT TO MAKE A REASONABLE CHARGE FOR ARRANGING ITS INTERESTS IN STREETS OR ALLEYS.

Sheet 1 of 4

DATE July 9, 1973

Bill C. Weber

SIGNATURE OF APPLICANT

All owners abutting the thoroughfare to be closed must sign the application.

Legal Owner	Lot No.	Block No.	Frontage & Depth
1. [illegible]	54	87	10[illegible] x 193
Wife [illegible]	Subdn. Hein Park		West side of W. D
2. [illegible]	74	91	100 x 150
Wife [illegible]	Subdn. Hein Park		East side of W. D
3. [illegible]	55	87	100 x 155
Wife [illegible]	Subdn. Hein Park		West side of W. D
4. [illegible]	53	87	60 x 218.5
Wife [illegible]	Subdn. Hein Park		West side of W. D
5. [illegible]	77	91	81.8 x 77
Wife [illegible]	Subdn. Hein Park		East side of W. D
[illegible]	75	91	100 x 170
Wife none	Subdn. Hein Park		East side of W. D
7. [illegible]	53	87	73.6 x 250
Wife [illegible]	Subdn. Hein Park		West side of W. D.
8. [illegible]	56	87	98 x 150
Wife [illegible]	Subdn. Hein Park		West side of W. D

CAR 75.77 CITY 10.00

PROCEDURE FOR FILING STREET OR ALLEY CLOSINGS

1. The official street or alley closing must be typewritten with six (6) copies.
2. Applications must be submitted on or before the regularly scheduled closing date.
3. All abutting property owners must indicate their approval by signing the application form. Spaces for this purpose are provided. Additional owners may sign additional application forms which are marked as sheet .... of ..... (Space provided)
4. File six (6) copies of a plat, certified by a registered Civil Engineer of the thoroughfare to be closed. Scale 1" = 100'. The plat must show all dimensions of the street or alley and dimensions at abutting lots. Indicate the names of abutting property owners on the plat.
5. One (1) sepia print of the plat at 1" = 100' scale, and a film positive reduced, if necessary to 8½" x 11".
6. Six (6) copies of a vicinity map including properties within a five hundred (500) foot radius. Only the pages of abutting property owners need be shown.

   Note: The plat and vicinity map may be combined in one drawing.
7. Six (6) copies of a legal description of the entire thoroughfare to be closed.
8. Six (6) copies of legal descriptions of portions to be conveyed to each adjoining owner.
9. Legal descriptions must read to the centerline unless the properties on both sides are under the same ownership.
10. The application fee is $100.00.

APPLICATION TO CLOSE STREETS OR ALLEYS

Memphis and Shelby County Planning Commission

CITY HALL • 125 NORTH MAIN STREET • MEMPHIS, TENNESSEE 38103 • TELEPHONE 527-6611

1. NAME OF THOROUGHFARE(S): West Drive

2. FROM (CROSS): Twenty-five (25) feet south of Jackson Avenue

3. TO (CROSS): Intersection of West Drive with south line of Jackson Avenue

4. REASONS: (1.) Reduce flow of through traffic using subdivision streets.

(2.) Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School. (3.) Reduce "traffic pollution" in a residential area, e.g. noise, litter, interuption of community living.

(ADDITIONAL REASONS MAY BE GIVEN ON A SEPARATE SHEET)

5. APPLICANT'S NAME: Hein Park Civic Association, Bill C. Gruber, M.D.

6. ADDRESS: 732 West Drive | ZIP: 38112 | PHONE: 452-6310

NOTE:

THE CITY OF MEMPHIS RESERVES THE RIGHT TO MAKE A REASONABLE CHARGE FOR RELEASING ITS INTERESTS IN STREETS OR ALLEYS

Sheet 2 of 4

DATE July 9, 1973

Bill C. Gruber
SIGNATURE OF APPLICANT

All owners abutting the thoroughfare to be closed must sign the application.

Legal Owner	Lot No.	Block No.	Frontage & Depth
1. Dr. W. Gruber	70	91	93.2 x 74.4
Wife Mrs. Bill C. Gruber	Subdn. Hein Park		E. side of Hein Dr.
2. Mrs. Mary Jane Allen	13	91	100 x 150
Wife [illegible]	Subdn. Hein Park		E. side of Hein Dr.
3. Ruth McAdoo	69	87	100 x 150
Wife [illegible]	Subdn. Hein Park		E. side of Hein Dr.
4. Klaus Stern	65	87	99 x 155
Wife Gene Stern	Subdn. Hein Park		E. side of Hein Dr.
5. Wm C McNeill	61	91	100 x 150
Wife Kay D. Womack	Subdn. Hein Park		E. side of Hein Dr.
6. Mrs. J. L. Fitzgerald	70	91	100 x 150
Wife [illegible]	Subdn. Hein Park		E. side of Hein Dr.
7. Mr. Kirby J. Gates	76	91	103 x 170
Wife See sheet No. 4	Subdn. Hein Park		E. side of Hein Dr.
8. Adele F. Lemen	71	91	100 x 150
Wife [illegible]	Subdn. Hein Park		E. side of Hein Dr.

...ION TO CLOSE STREETS OR ALLEYS

Memphis and Shelby County Planning Commission

CITY HALL • 125 NORTH MAIN STREET • MEMPHIS, TENNESSEE 38103 • TELEPHONE 527-6611

...ame of Thoroughfare): West Drive

...ocation: Twenty-five (25) feet south of Jackson Avenue

...Limits: Intersection of West Drive with south line of Jackson Avenue

...Reason: (1.) Reduce flow of through traffic using subdivision streets.

(2.) Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School. (3.) Reduce traffic pollution in residential area, i.e., noise, litter, interruption of community living.

(ADDITIONAL REASONS MAY BE GIVEN ON A SEPARATE SHEET)

...Applicant's Name: Hein Park Civic Association, Bill C. ...ober, M.D.

...Address: 782 West Drive | ZIP 38112 | PHONE 452-6310

NOTE: THE CITY OF MEMPHIS RESERVES THE RIGHT TO MAKE A REASONABLE CHARGE FOR RELEASING ITS INTEREST IN STREETS OR ALLEYS

Sheet ___ of 1

DATE July 9, 1973

Bill G. Weber
SIGNATURE OF APPLICANT

All owners abutting the thoroughfare to be closed must sign the application.

Owner	Lot No.	Block No.	Frontage & Depth
Ima P. Patel	69	91	100 x 150
Wife None	Subdn. Hein Park		East side of West Dr.
Heather Lowe	63	87	100 x 150
Wife Evelyn M. Lowe	Subdn. Hein Park		West side of West Dr.
Lieb M. Lieber	58	87	100 x 150
Wife None	Subdn. Hein Park		West side of West Dr.
Nelson W. Gillis	76	91	103 x 170
Wife None	Subdn. Hein Park		East side of West Dr.
Foster Lee	60	87	100 x 150
Wife Patricia	Subdn. Hein Park		West side of West Dr.
Mary L. Oliver	59	87	100 x 150
Husband None	Subdn. Hein Park		West side of West Dr.
[illegible]	66	91	135 x 155
Wife [illegible]	Subdn. Hein Park		East side of West Dr.
Ira T. [illegible]	61	87	100 x 150
Wife None	Subdn. Hein Park		West side of West Dr.

APPLICATION TO CLOSE STREETS OR ALLEYS

Memphis and Shelby County Planning Commission

CITY HALL • 125 NORTH MAIN STREET • MEMPHIS, TENNESSEE 38103 • TELEPHONE 527-6619

1. NAME OF STREET(S): West Drive

2. FROM (POINT A): Twenty-five (25) feet south of Jackson Avenue

3. TO (POINT B): Intersection of West Drive with south line of Jackson Avenue

4. REASONS: (1.) Reduce flow of through traffic using subdivision streets.

(2.) Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School. (3.) Reduce "traffic pollution" in a residential area, e.g. noise, litter, interruption of community living.

(ADDITIONAL REASONS MAY BE GIVEN ON A SEPARATE SHEET)

5. APPLICANT'S NAME: Hein Park Civic Association, Bill C. Weber, M.D.

6. ADDRESS: 702 West Drive | ZIP: 38112 | PHONE: 452-6310

NOTE:

"THE CITY OF MEMPHIS RESERVES THE RIGHT TO MAKE A REASONABLE CHARGE FOR RELEASING ITS INTERESTS IN STREETS OR ALLEYS"

Sheet 4 of 4

DATE July 9, 1973

Bill C. Weber

SIGNATURE OF APPLICANT

All owners abutting the thoroughfare to be closed must sign the application.

Legal Owner	Lot No.	Block No.	Frontage & Depth
1. Mrs Pattie Fulton	72	91	100 x 150
Wife, name —	Subdn. Hein Park		East side of West Dr.
2. [illegible]	64	87	100 x 150
Wife None	Subdn. Hein Park		West side of West Dr
3. B A Bermingham	57	87	102 x 150
Wife Lucile S Bermingham	Subdn. Hein Park		West side of West Dr
4. Ruth E Hunters MD	69	91	100 x 150
Wife None	Subdn. Hein Park		East side of West Dr.
5. John B Thomas	63	87	100 x 150
Wife Penelope B Thomas	Subdn. Hein Park		West side of West Dr.
6. [illegible]	73	91	100 x 150
Wife [illegible]	Subdn. Hein Park		East side of West Dr.
			x

Signatures on this sheet (4 of 4) for Lot numbers 63 and 73 represent new owners. Signatures for these Lots on previous pages are from the former owners.

MARVIN W. WHITE
JOSEPH D. HAAS
Consulting Engineers
3294 Poplar Avenue
Memphis, Tennessee 38111
Telephone 901 452-7359

In the Century Building

CERTIFICATE OF SURVEY

This is to certify that I have made a survey of the property involved for transferring the west part of the north 25 feet of West Drive to the re-subdivided north part of Lot No. 53 in Hein Park Subdivision as recorded in the Register's Office of Shelby County, Tennessee. The parcel to be transferred is more particularly described as follows:

BEGINNING at a point in an extension of the south property line of Jackson Avenue where said property line crosses the north end of West Drive, said beginning point being 37.92 feet west of the northwest corner of the re-subdivided north part of Lot No. 77 in Hein Park Subdivision, as measured along said extension of the south property line of Jackson Avenue and running thence westwardly along said extension of property line 37.92 feet to the northeast corner of the re-subdivided north part of Lot No. 53; thence southwardly along the west property line of West Drive 26.1 feet to a point; thence eastwardly along a line 25.0 from and parallel with Jackson Avenue 37.92 feet to a point in West Drive; thence northwardly and parallel with the west property line of West Drive 26.1 feet to the point of beginning as shown on the accompanying plat, dated June 25, 1973.

Marvin W. White
MARVIN W. WHITE
JOSEPH D. HAAS
Consulting Engineers
3294 Poplar Avenue
Memphis, Tennessee 38111
Telephone 901 452-7359

In the Century Building

CERTIFICATE OF SURVEY

This is to certify that I have made a survey of the property involved for transferring the east part of the north end of West Drive to the re-subdivided north part of Lot No. 77 in Hein Park Subdivision as recorded in the Register's Office of Shelby County, Tennessee. The parcel to be transferred is more particularly described as follows:

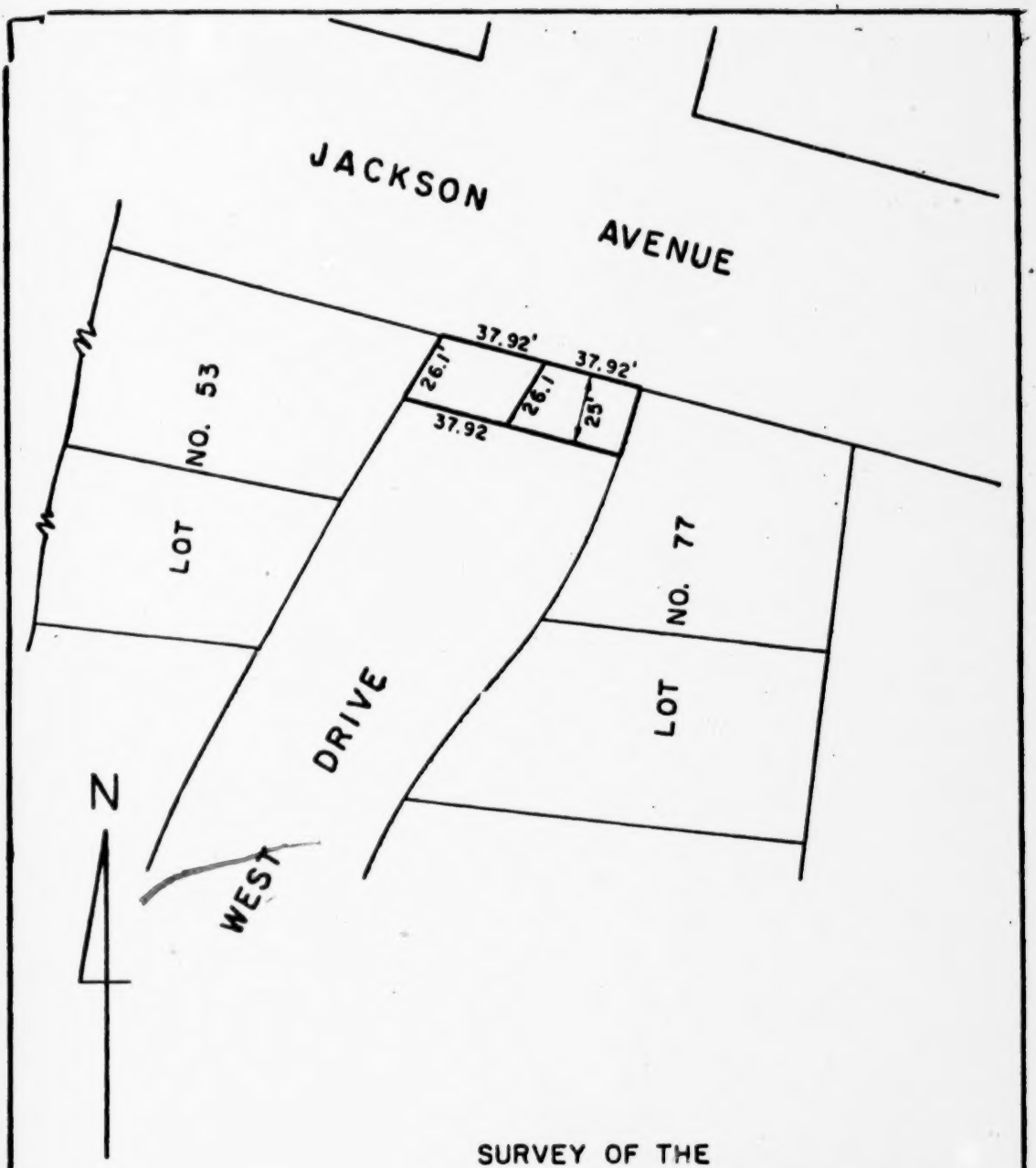
BEGINNING at the northwest corner of the re-subdivided north part of Lot No. 77 in Hein Park Subdivision, said point being at the intersection of the south property line of Jackson Avenue with the east property line of West Drive, and running thence westwardly along an extension of the south property line of Jackson Avenue 37.92 feet to a point; thence southwardly along a line parallel with the west property line of West Drive 26.1 feet to a point; thence eastwardly along a line 25 feet from and parallel with an extension of the south property line of Jackson Avenue, to a point in the east property line of West Drive; thence northwardly along said east property line of West Drive to the point of beginning, as shown on the accompanying plat, dated June 25, 1973.

Marvin W. White

Hein Park Civic Association
Hein Park Subdivision
Memphis, Tennessee 38112

1.	Traffic Engineer Mr. Robert A. Fosnaugh	No objection
2.	City Fire Department Lt. H. D. Crossnine	No objection provided the design of closure will allow the free passage of firefighting equipment. This provision has been provided for in our proposal
3.	Memphis Light, Gas & Water Div. Right of Way Department Mr. Frank W. McBride	No objection
4.	South Central Bell Engineering Department Mr. G. E. Pyron	No objection
5.	City of Memphis Sanitation Dept. Mr. Maynard [Stiles]	No objection
6.	Division of Public Works Mr. Sam Beech	No objection
7.	City of Memphis Police Department Chief Leatherwood	No objection

/s/ Bill C. Weber
Bill C. Weber, M.D.
Street Project Chairman
782 West Drive
Memphis, Tennessee 38112



SURVEY OF THE

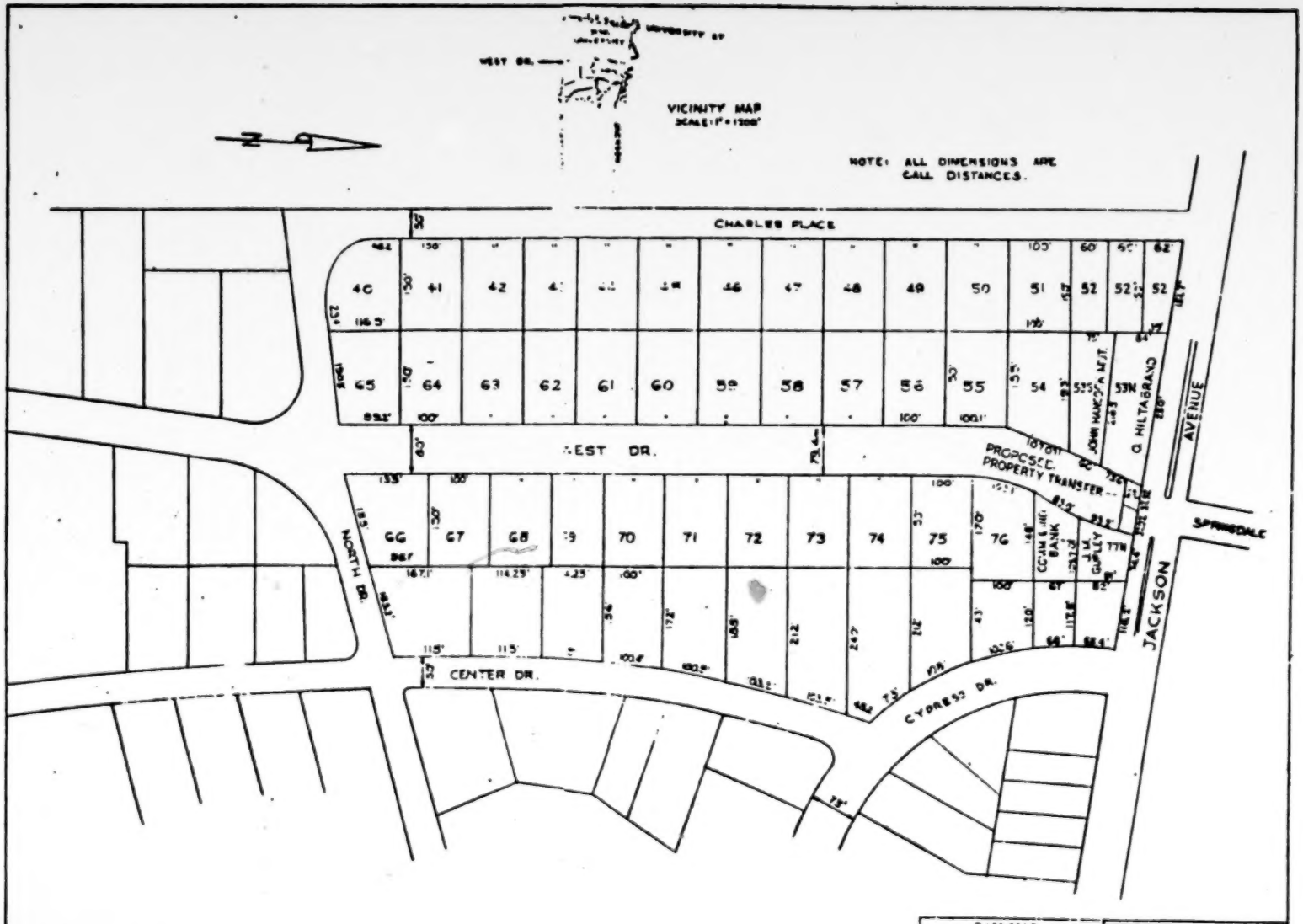
NORTH 25 FEET OF WEST DRIVE
IN HEIN PARK SUBDIVISION

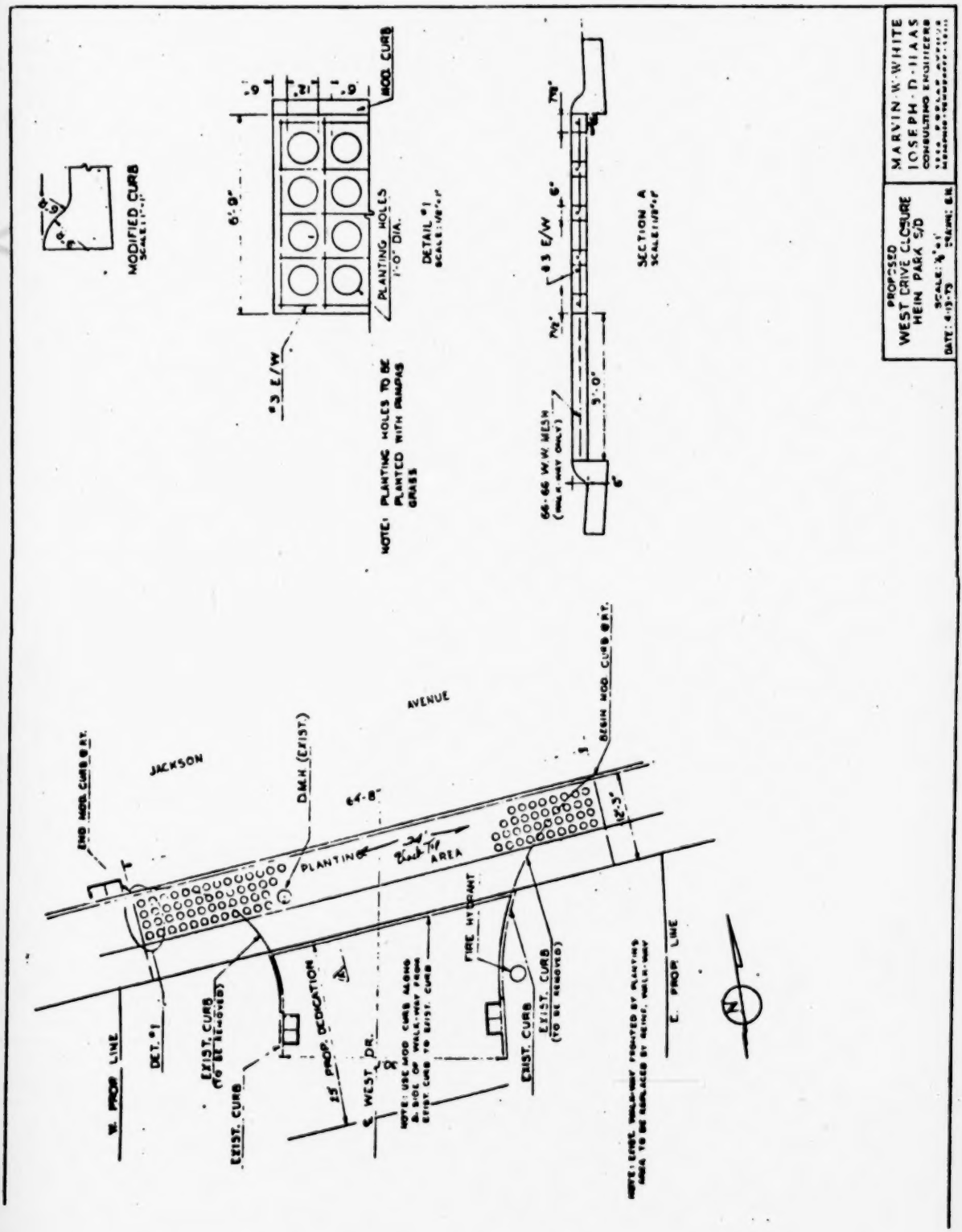
IN SHELBY COUNTY, TENNESSEE

SHOWING PROPOSED DIVISION OF
STREET PROPERTY TO RESIDENTIAL LOTS

SCALE : 1" = 50' JUNE 25, 1973

MARVIN·W·WHITE
JOSEPH·D·HAAS
CONSULTING ENGINEERS
3594 POPLAR AVENUE
MEMPHIS·TENNESSEE·38111


VICINITY MAP
SCALE: 1" = 1200'
NOTE: ALL DIMENSIONS ARE CALL DISTANCES.
CHARLES PLACE
WEST DR.
CENTER DR.
NORTH DR.
CYPRESS DR.
JACKSON AVENUE
SPRINGDALE
PROPOSED PROPERTY TRANSFER
JOHN HANCOCK MUT.
O. HILTABRAND
COMM'L. IND. BANK
J.H. GURLEY TTN
PROPOSED
WEST DRIVE CLOSURE
HEIN PARK S/D
MARVIN·W·WHITE
JOSEPH·D·HAAS
CONSULTING ENGINEERS


PROPOSED
WEST DRIVE CLOSURE
HEIN PARK S/D
MARVIN W. WHITE
JOSEPH D. HAAS
CONSULTING ENGINEERS
MODIFIED CURB
DETAIL #1
NOTE: PLANTING HOLES TO BE PLANTED WITH RINDRAS GRASS
6x6 W.W. MESH
SECTION A
JACKSON AVENUE
END MOD. CURB BY.
DMH (EXIST.)
PLANTING AREA
BEGIN MOD. CURB BY.
EXIST. CURB (TO BE REMOVED)
W. PROP. LINE
E. PROP. LINE
15' PROP. DEDICATION
WEST DR.
FIRE HYDRANT
N

(Filed June 21, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

NO. C-74-208

N. T. GREENE,
Plaintiff,

ELNORA PRIEST CROSS, EDWIN OWENS,
CAROLYN BURSE,
Intervenors,

vs.

CITY OF MEMPHIS, A Municipal Corporation, WYETH CHANDLER, as Mayor, THE COUNCIL OF THE CITY OF MEMPHIS, and EDWIN McBRAYER, as Chairman of the Council of the City of Memphis,
Defendants.

MEMORANDUM DECISION

This is a cause of action which was filed to prevent the implementation of the action of the defendants as officials of the municipality, the City of Memphis, Tennessee, from effectively closing a residential street to the public.

The case was dismissed previously by another Judge of this District upon a motion to dismiss for failure to state a claim upon which relief could be granted. On appeal the Court of Appeals for the Sixth Circuit reversed and remanded because it found that the original plaintiff Greene did state claims upon which relief might be granted. *Greene v. City of Memphis*, 535 F.2d 976 (C.A. 6 1976).

In remanding this case, the Court of Appeals stated in part:

> We view Greene as having stated claims under 42 U.S.C. §1982 and 42 U.S.C. §1983. Section 1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, reasonably aver that the closing confers certain benefits, *to wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis, than similarly situated whites who "hold" their "real property subject to having the city confer the dead-end street benefit on their property. 535 F.2d 978 . . . . We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those "persons[s]" clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets. 535 F.2d 978, 79.

After the remand the case was transferred to the undersigned Judge of this District and the original attorney for the plaintiffs was allowed to withdraw on his own motion. Considerable delay was encountered before new counsel was obtained. Intervention was allowed by three additional plaintiffs.[1]

---

1. At the trial on remand the only original plaintiff who was still a party was N. T. Greene, who acted *pro se.* A. C. Wharton, Jr. of Memphis Area Legal Services ably represented the intervenors.

Motions to amend the complaint were allowed to allege the failure of the defendants to provide sidewalks on the street in question, the existence of a class action, and pendent jurisdiction of this Court to grant relief because the defendants did not comply with state laws and municipal ordinances and regulations.

A non-jury trial was held and this Memorandum Decision sets forth the findings of facts and conclusions of law of that trial.

Before setting forth the more specific findings of facts, the basic factual information must be stated.

The case pertains to a subdivision in the heart of Memphis, Tennessee, known as Hein Park. It was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained. To the west of Hein Park is the sizeable and handsomely landscaped Southwestern College campus; the southern boundary of Hein Park is a boulevard which is the northern boundary for a large park and zoo; the eastern boundary is a large cross-town thoroughfare, which also contains residences; and the northern boundary is Jackson Avenue which carries considerable traffic, much of which is commercial in nature.

The street involved in this litigation is known as West Drive. It extends the complete length of the subdivision, which is about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street, which serves a sizeable area composed of black citizens. These are primarily the persons who will be inconvenienced by the so-called closing of West Drive.

The partial closing will be accomplished by having the northernmost property owners on West Drive buy a

25-foot east-west strip across the entire width of the street. Because officials of certain departments of the city deem it necessary that public service vehicles will be able to cross the strip, a 24-foot gap will be left in the barricade. There will be a speed breaker across the gap, but other details, such as signs, have not been finalized.

On July 9, 1973, an application was made by members of the Hein Park Civic Association for the closing of a portion of West Drive just south of its intersection with Jackson Avenue in Memphis, Tennessee (Trial Exhibit 13). The application states that the reasons for the requested closure are to: "1. Reduce flow of traffic using subdivision streets, 2. Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School, 3. Reduce 'traffic pollution' in a residential area, e.g. noise, litter, interuption (sic) of community living."

On the printed face of the application it is provided that "All owners abutting the thoroughfare to be closed must sign the application." The back of the application lists the Procedure for Filing Street or Alley Closings and includes this same requirement. It was stipulated by counsel in the pre-trial order that the purported owners of the two lots abutting the 25-foot strip of West Drive sought to be closed, signed the application submitted to the Planning Commission (Pre-Trial Order, page 6).

The Procedures listed on the back of the application also provide that additional owners may sign the application. The application contains the purported signatures of the owners of 26 lots on West Drive in addition to the two lots which are involved in the closing.

Sections 4 and 6 provide that the names of abutting property owners be shown on the plat that must be filed

with the application. An examination of the plat filed with the application reveals that only the names of the owners of lots 53 and 77 along West Drive appear. Other lots along West Drive are denoted on the plat only by number.

The Planning Commission staff received a letter from Mrs. Sara F. Terry, a resident of West Drive, indicating her opposition to the proposed closing of West Drive at Jackson Avenue. Mrs. Terry indicated that she and her husband, Fred, had purchased the property at 732 West Drive and had lived there since April 28, 1973. Mrs. Terry testified at the hearing in this Court that she had been approached to sign the application by someone in the neighborhood and that she was told that the reason the closure was being sought was to eliminate "undersirable traffic." Mrs. Terry did not sign the application. She appeared before the Memphis City Council on January 29, 1974, and spoke in opposition to the resolution closing a portion of West Drive.

The staff of the Planning Commission interprets the phrase "owners abutting the thoroughfare to be closed" in its requirements for application to close streets or alleys to mean only those persons whose property physically touches some part of the street or alley that is to be closed to the public use. The property, once closed, is deeded by quit-claim deeds to these abutting owners.

Upon receipt of the application the Planning Commission staff followed the usual procedure and communicated with various departments of the City Government in an attempt to discern their feelings regarding the closure.

Memphis Light, Gas, and Water Division offered no objection to the closure provided an easement was retained

for existing and future utility services. An examination of the resolution passed by the City Council indicates this condition was satisfied (T.E. 1, 5, 4, and 10).

South Central Bell Telephone System had no objection to the closing (T.E. 9).

The Fire Department indicated it could not approve the closure unless there was the 24-foot clearance with no obstructions other than the rolled curbing as submitted and the normal type of rolled speed breaker (T.E. 11, 4). The resolution passed by the City Council provides for this to be done (T.E. 1).

A memorandum from the Director of the Memphis Police Department to a Planning Assistant of the Planning Commission indicated that police response time would be inhibited, but he believed that "the residents of the [West Drive] area are competent to decide which problem they prefer to live with." (T.E. 6.)

The Sanitation Department sent three separate written communications to the Planning Commission regarding this closure. First they objected to the closure, then they offered no objection provided a turn-around was provided, and finally, they reported having no objection (T.E. 7, 8, 12). Mr. Paul Goldstein of the Planning Commission staff testified that he thought a turn-around was incorporated in the final plan; however, neither the specifications nor the resolution refer to a turn-around (T.E. 1, 13). Presumably, sanitation trucks will be allowed to utilize the same 24-foot clearance that is available to emergency vehicles for passage through the area.

There is no written communication from the Traffic Engineering Department after the time this application was filed in July 1973. The file does contain an earlier set of writings from that department (collective T.E. 14).

Mr. Goldstein explained that departmental work done prior to an application being filed may be part of the pre-application process.

It appears from the Traffic Engineering file that was forwarded to the Planning Commission that the department had reservations concerning an earlier comprehensive plan of the Hein Park residents to close several north-south streets in the subdivision. The then Traffic Engineer, Mr. Robert Fosnaugh, advised that, "From a practical standpoint . . . it appears that merely closing West Drive at Jackson would eliminate a major portion of the through traffic using subdivision streets; thereby achieving most of the original objective of the proposal." (Collective T.E. 14, page 3.) A cover letter that accompanied the application to close West Drive at Jackson Avenue filed on July 9, 1973, indicates that it was upon Mr. Fosnaugh's recommendation and advice that the application to close a portion of West Drive was made (T.E. 13).

The Memphis and Shelby County Planning Commission voted at its November 1, 1973, regular meeting that the closure of West Drive at Jackson Avenue be approved, with conditions relating to the Memphis Light, Gas and Water facilities and the Fire Department that have been previously mentioned. A copy of the letter informing the City Attorney of this action and requesting him to present the matter to the City Council was sent to Mr. and Mrs. Fred H. Terry, the objectors on West Drive (T.E. 4).

The matter came on for hearing before the City Council on January 29, 1974. At the City Council meeting after presentation of the proposal by Mr. Robert Miller, Executive Director of the Planning Commission, four persons spoke in favor of the resolution and seven persons spoke in opposition, including Mrs. Fred. H. Terry and the plaintiff

N. T. Greene. Each side was given 15 minutes to present its views.

Both during and after the speakers' presentations members of the City Council asked questions concerning various aspects of the proposal and debated among themselves the merits and demerits of the proposal. After discussion, a vote was taken on the resolution to close a portion of West Drive with the certain conditions previously mentioned. The resolution passed (T.E. 26, 1).

On February 5, 1974, the City Council reconsidered the closure and again voted to close this portion of West Drive (T.E. 27, 2). The next week the City Council heard four speakers on the question of re-opening West Drive; however, no vote was taken, since the item was not on the agenda other than as a discussion item (T.E. 28).

On February 26, 1974, a resolution regarding the re-opening of West Drive was held over until March 5, 1974 (T.E. 29). On March 5, 1974, a hearing was held on a resolution that sought to re-open West Drive. There were nine speakers in favor of the re-opening, including plaintiff N. T. Greene. Two persons spoke in favor of keeping the street closed. The resolution regarding the re-opening of West Drive was voted on by the City Council and failed to pass (T.E. 30, 31).

When preparations for the hearing of this case were being made, city officials discovered an oversight in the earlier proceedings. Therefore, on January 31, 1978, the City Council passed a resolution correcting the legal description contained in the earlier resolution. Plaintiff, N. T. Greene, and Mr. A. C. Wharton, attorney for the intervening plaintiffs, spoke in opposition to this change. The legal description contained in the 1974 resolution covered only the western half of the proposed closure, which was

to be deeded to the abutting owner of lot 53 north. After amendment, the legal description contained in the resolution matches the area of West Drive that is to be closed according to the plans submitted by the applicant's engineer (T.E. 341, 13).

Plaintiff N. T. Greene testified at the trial in this Court that the closure would compound the multitude of negative experiences that he has encountered as a black person. He complained that the closure would prevent convenient vehicular access to various facilities contained in Overton Park and would cause him, his family and neighbors psychological and emotional damage. His home is located on Terry Circle in Memphis, Tennessee, which is northwest from the intersection of West Drive and Jackson Avenue (T.E. 22). Insofar as his use of West Drive to and from his residence, the closure would cause him no actual inconvenience. He also complained of the fact that there are no sidewalks, curbs, or gutters along any portion of West Drive, a fact stipulated to by counsel (Pre-Trial Order, page 6).

Mrs. Elnora Priest Cross, an intervening plaintiff, testified that she would like to be able to go through West Drive. She has a friend who works at the home of someone who lives on West Drive and contacts her in the event of an emergency.[2] Mrs. Cross lives on Smith Avenue, which is a dead-end street in north Memphis (T.E. 22).

Mr. Edwin Owens, another intervening plaintiff, testified that he does not wish to have West Drive closed, nor does he wish the street that he lives on to be closed. He is presently residing in another area of Memphis known as Frayser (T.E. 22). His chief complaints against the

---

2. Mrs. Cross will still be able to reach her friend; however, she will be inconvenienced by having to use a different route.

city government arise from conditions which existed at his previous address on Bellevue. They center around the fact that garbage trucks used to pass down the street emitting noxious odors on the way to the dump. He has also had to step off of buses into mud on some occasions because of a lack of sidewalks. These matters occurred in parts of Memphis other than West Drive. He does not know of a black neighborhood that has applied to have a street closed.

Mr. Harrell Moore, a licensed real estate broker for 17 years, testified that it was a benefit to residents to live on a closed street. He felt that the closing of West Drive would create a "utopian community." However, in his expert opinion there would not be a decrease in value experienced by the property owners located to the north of West Drive because of the closure.

Dr. Marvin Feit, an assistant professor at the University of Tennessee School of Social Work, testified that it was his opinion that closing West Drive would result in negative consequences in the form of hostility towards the people who live in Hein Park, increased vandalism, school harassment, and increased arrests by police. He also was of the opinion that the closure would result in more disgruntled drivers.

Mr. Calvin Woods, Jr. indicated that he was opposed to the closure of West Drive because he felt that it would cause the traffic to be shifted over to his street, which is East Drive, north of Jackson.

Mr. Robert Miller, the Executive Director of the Planning Commission staff, testified in this cause that the motive of the Planing Commission staff in recommending the closure of West Drive was to provide the residents of that street with a more tranquil neighborhood. He also testified that in his opinion the southbound traffic

that would be prohibited by the closure would not be greatly inconvenienced by the closure since one block to the east there is a street, Trezevant, that gives straight access all the way to South Memphis and the State of Mississippi, and several blocks to the west there are University and McLean Streets, which are major thoroughfares offering additional access to southbound traffic to the nearby Overton Park and Snowden School and other more remote attractions south and west of Hein Park.

Mr. Paul Goldstein, a Planning Assistant with the Planning Commission, testified that it was his responsibility to accept and process applications for street and alley closings. His duties included communicating with the various departments of City government concerning their views on the proposed street or alley closings and making a field study of the area under scrutiny.

He explained that a document entitled "West Drive Street Closure" contained in the file was not an official document of the Planning Commission (T.E. 21). The document states in part on page 2, number 4, "As required on the official application form all abutting and affected property owners must sign request for street closure." The words "abutting and affected" are handwritten above the typewritten word "affected" which has been crossed out.

Mr. Goldstein testified that these were the notes of Mr. Jerry Cook, an employee of the Planning Commission who was not a part of the street and alley closing section of the Planning Commission but rather was in the zoning section. He had been asked to attend a meeting concerning West Drive that Mr. Goldstein could not attend and had prepared the notes as a result of that new assignment. He noted in his testimony that the official application does not require the signatures of "affected" owners. It only requires the "abutting" owners to sign (T.E. 13).

Mr. Goldstein's testimony reflects that the City of Memphis has on other occasions received and granted requests from residents of black neighborhoods to have streets or alleys closed. These are summarized below. However, it is noted that none of these involved closing a street for the purpose of stopping through traffic.

On July 3, 1973, six days prior to the application filing date in the West Drive case, the City Council closed a small portion of an alley located between East McLemore Avenue and Stafford Avenue, which is a black neighborhood in Memphis, Tennessee, thereby creating a dead end to the alley. The applicant was the Union Valley Baptist Church, acting through its black pastor. The church owned the property on both sides of the alley that touched the portion of the same that was to be closed, and only a representative of the church signed the application. None of the other owners along the alley, whose access to East McLemore by this route would be terminated, signed the application. The abutting owner agreed to pay $262.00 for a quit claim deed to the property involved. The application submitted states that the reason for the requested closure was to allow expansion of a church building by joining two separate parcels owned by the church into one larger parcel of land.

A similar application was received to close a portion of an alley bordered on both sides by the Vance Avenue Church of Christ. The trustees of the church are the only persons who signed the application. None of the other owners along the alley or across Vance have signed the application. The area is a black neighborhood. The application states that the reason for the closure is that the "Church desires to improve lot to east of church structure and the subject portion of present alley as off-street parking facility." (T.E. 36.) The Planning Commission file

reflects that the Planning Commission approved the closure on July 3, 1974, with certain conditions relating to utility and telephone easements and Fire Department access. What action, if any, was taken by the City Council is not contained in the file.

In June of 1971, LeMoyne-Owen College, a black institution of higher learning in Memphis, applied for the closing of a portion of Louisa Street north of Saxon Avenue. The application reflects that the closure was essential to the completion of a building project and to the best use of the area. The college owned the property on both sides of the requested closure. Mrs. Eva Payne, whose property touched the closure at one corner, also joined in the application by a subsequent letter. The Planning Commission approved the closure in August of 1971 conditioned upon easements being provided or reserved for sanitary sewers and Memphis Light, Gas and Water facilities. On August 17, 1971, the City Council approved the closing by a resolution containing the above conditions (T.E. 33.)

In two cases, one involving Benton Street and the other involving a portion of Ruth Street, the Planning Commission received requests to close streets which had been dedicated to the City, but had never been opened for traffic (T.E. 34, 37). The applications, made in 1968 and 1972 respectively, contain the signatures of all persons who abut along the portions of street which are to be closed. In both cases this portion includes the entire street between two intersecting streets. The areas involved are black neighborhoods. The files reflect that the Planning Commission approved both closures. On January 30, 1973, a resolution passed by the City Council approved the closure of Ruth Street and states that the abutting owners have agreed to pay $1,200.00 for the closing. The Benton Street file does not reveal any action taken by the City Council.

CONCLUSIONS OF LAW

As heretofore noted the Court of Appeals in its remand opinion directed that the issues to be considered included whether or not "the closing of West Drive left certain white residents with the privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street." Upon a consideration of the facts established, this Court concludes that the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens.

The Court of Appeals remand opinion also stated:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation.

After the remand opinion of the Court of Appeals in the case, the Supreme Court of the United States has spoken to this topic in the case of *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (Jan. 11, 1977). In doing so the Court explained the significance of "racially disproportionate impact" upon the standard of racial mo-

tivation and intent which is required to prove a constitutional violation.

The Supreme Court opinion stated in part:

> Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.*, at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . . .
>
> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

The opinion also noted that the discriminatory purpose might be shown when a clear pattern of discrimination, unexplainable on grounds other than race, emerges from the effect of the state action even when the legislation appears neutral on its face. When the pattern is not stark (egregious), a court must look to other evidence.

On pages 267 and 268 the opinion sets forth several evidentiary sources for determining the issue of intent: (1) The historical background of the legislative decision,

particularly if it reveals a series of official actions taken for invidious purposes. (2) The specific sequence of events leading up to the challenged decision. (3) Departures from the normal procedural sequence. (4) Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached. (5) the legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes of its meeting, or reports. The list is not intended to be exhaustive.

This Court concludes that the closure of West Drive in the manner adopted by the City Council will have disproportionate impact on certain black citizens. However, the Court also concludes that there is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation.

As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return.

However, this Court does not believe that the disparate impact is so stark that a purpose or intent of racial discrimination may be inferred. It must be noted that excessive traffic in any residential neighborhood has public welfare factors such as safety, noise, and litter, regardless of the race of the traffic and the neighborhood.

Furthermore, the Court of Appeals remand opinion noted that the allegations of the complaint in this case in nowise approached the egregiousness of the facts in *Hawkins v. Town of Shaw*, 437 F.2d 1286 (C.A. 5 1971), 461 F.2d 1171 (C.A. 5 1972) (*en banc*). In doing so the Court of Appeals remand opinion also endorsed the caveat that every disparity of services between citizens of a city does not create a right of access to federal courts for redress. 535 F.2d at page 979.

Similarly this Court does not find a purpose or intent to racially discriminate based upon a consideration of other evidence in the case as directed in *Arlington Heights v. Metropolitan Housing Corp., supra*, 429 U.S. at 267, 68.

As heretofore noted, one of the evidentiary sources to establish discriminatory intent referred to in *Arlington Heights* was departures from the normal procedures.

In this case counsel for the intervening plaintiffs has urged that departures from the standard procedures not only establish discriminatory intent, but also the departure from normal procedures and the normal procedures which were followed did not afford the plaintiffs and the members of their class minimal procedural due process; in that they were given no notice of the hearing, they were not provided a meaningful hearing, and the processes followed in street closing are not based upon clear standards. This Court concludes that there were not significant departures from normal procedures and that there was not a denial of due process based upon lack of notice and a meaningful hearing.

With regard to the lack of clear standards in street closing proceedings, the Court notes that alley and street closings are infrequent and unusual, and each one presents different factors to be taken into consideration by the

city officials. As the Supreme Court noted in *Arlington Heights*, "In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits, absent a showing of arbitrariness or intentionality." In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits even though the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the black citizens north of Hein Park, the aggravation of racial hostility with the attendant retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and the inconvenience and delay to Sanitation Department employees.

In summary this Court concludes that the proof does not establish the entitlement of the plaintiffs to relief under 42 U.S.C. §§ 1982, 1983, nor any other federal statute or case authority. This includes the relief sought in an amendment to the complaint which sought a decree that the defendants should be required to cause sidewalks, curbs and gutters to be installed on West Drive. There was no proof which would authorize this Court to intervene on a racial disparity basis and this Court is not the proper forum to seek to enforce the ordinances of the City of Memphis pertaining to the installation of curbs, gutters and sidewalks in the absence of a constitutional deprivation in the wording or application of the ordinance.

Another post remand amendment to the complaint asks that this Court exercise pendent jurisdiction in order to require the defendants to correct the wrongs caused by the failure of the defendants to follow their own procedures and the law of Tennessee. In this regard the plaintiffs contend that the defendants used a definition of "abutting

owner" that was too narrow and that the defendants abused their discretion and were guilty of fraud in closing West Drive, which is prohibited under the law of Tennessee as announced in *Sweetwater Valley Memorial Park, Inc. v. City of Sweetwater,* 213 Tenn. 1, 372 SW 2d 168 (1963). This Court concludes that the evidence does not support a recovery under these or any other theory under the law of Tennessee.

For the reasons set forth above the Clerk of this Court is directed to enter a Judgment for the defendants.

ENTER: This 21 day of June 1978.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge
United States District Court

(Decided November 1, 1979)

N. T. GREENE, Plaintiff-Appellant
(78-1527),

Elnora Priest Cross, Edwin Owens and
Carolyn Burse (78-1528),
Plaintiffs-Intervenors-Appellants,

v.

CITY OF MEMPHIS, Wyeth Chandler, the Council of the
City of Memphis and Edwin McBrayer,
Defendants-Appellees.

Nos. 78-1527, 78-1528.

United States Court of Appeals,
Sixth Circuit.

Argued June 5, 1979.

Decided Nov. 1, 1979.

Action was instituted against city and various of its officials for allegedly unlawfully closing a street. The United States District Court for the Western District of Tennessee, Robert M. McRae, Jr., J., entered judgment in favor of defendants, and appeal was taken. The Court of Appeals, Engel, Circuit Judge, held that closing of street, which in effect erected a physical barrier between a historically all-white residential neighborhood and a predominantly black neighborhood and which had a disproportionate adverse impact upon certain blacks with regard to noise, traffic and reduction of property values, rose to a level of

"badge of slavery" and constituted a violation of section of Civil Rights Act governing property rights of citizens.

Reversed and remanded.

Celebrezze, Circuit Judge, filed dissenting opinion.

1. Civil Rights (Key) 11

Constitutional Law (Key) 83(2)

Closing of street, which in effect erected a physical barrier between a historically all-white residential neighborhood and a predominantly black neighborhood and which had a disproportionate adverse impact upon certain blacks with regard to noise, traffic and reduction of property values, rose to a level of a "badge of slavery", and constituted a violation of section of Civil Rights Act governing property rights of citizens. U.S.C.A.Const. Amend. 13; 42 U.S.C.A. § 1982.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law (Key) 83(2)

Not every racially discriminatory act constitutes a badge of slavery. U.S.C.A.Const. Amend. 13.

N. T. Greene, pro se.

Alvin O. Chambliss, Jr., National Conference of Black Lawyers, Oxford, Miss., for plaintiffs-appellants.

Michael C. Speros, Charles V. Holmes, Asst. City Attys., for defendants-appellees in both cases.

Clifford D. Pierce, Jr., City Atty., Memphis, Tenn., for defendants-appellees in No. 78-1527.

A. C. Wharton, Jr., Memphis Area Legal Services, Inc., Memphis, Tenn., for plaintiffs-intervenors-appellants.

Before CELEBREZZE, ENGEL and KEITH, Circuit Judges.

ENGEL, Circuit Judge.

This litigation arises out of efforts by the residents of Hein Park, a subdivision located in Memphis, Tennessee, to close West Drive at its northerly end so as to bar all through traffic.[1] As found by the district court, Hein Park

> was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained. To the west of Hein Park is the sizeable and handsomely landscaped Southwestern College campus; the southern boundary of Hein Park is a boulevard which is the northern boundary for a large park and zoo; the eastern boundary is a large crosstown thoroughfare, which also contains residences; and the northern boundary is Jackson Avenue which carries considerable traffic, much of which is commercial in nature.
>
> The street involved in this litigation is known as West Drive. It extends the complete length of the subdivision, which is about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street, which serves a sizeable area composed of black citizens. These are

---

1. A map of central Memphis is attached hereto as an appendix.

> primarily the persons who will be inconvenienced by the so-called closing of West Drive.

As the map indicates, Springdale Street is, in fact, a northward extension, under another name, of West Drive.

The proposed closing is described by the district court in its opinion:

> The partial closing will be accomplished by having the northernmost property owners on West Drive buy a 25-foot east-west strip across the entire width of the street. Because officials of certain departments of the city deem it necessary that public service vehicles will be able to cross the strip, a 24-foot gap will be left in the barricade. There will be a speed breaker across the gap, but other details, such as signs, have not been finalized.

Although the record is uncertain whether the northernmost property owners who are acquiring the east-west strip across the width of West Drive will, in fact, bar all foot traffic as well, it is clear that the proposed conveyance will leave them with the absolute right to do so if they wish, since the property will be private in all respects except for retained rights-of-way for certain service and emergency vehicles and utility easements.

Plaintiffs, certain black individuals and members of a class of black persons in the City of Memphis who own or stand to inherit property immediately to the north of and adjoining the Hein Park area, have attempted from the beginning to prevent the closing. They principally claim in this lawsuit that the closing of West Drive deliberately creates a barrier between the all-white Hein Park subdivision and the predominantly black residential area to the north, limiting access to and from the latter and impairing their property values. The closing is claimed to be a violation of their rights under the Thirteenth and Fourteenth

Amendments;[2] they seek relief under 42 U.S.C. §§ 1982 and 1983.[3]

In an earlier appeal, our court reversed a judgment of the district court which dismissed the original complaint for failure to state a claim. In so doing, we held that the district court relied too heavily on *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), and its ruling that the closings of municipal swimming pools would not violate the Equal Protection Clause of the Fourteenth

---

2. U.S.Const. amend. XIII provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S.Const. amend. XIV, in part, provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction, thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

3. 42 U.S.C. § 1982 (1976) provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983 (1976) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Amendment where it was shown that such closings prevented whites and blacks equally from enjoying the pools. *Greene v. City of Memphis,* 535 F.2d 976 (6th Cir. 1976) (*Greene I*). In remanding, we held that the facts alleged in the complaint, construed in the light most favorable to the plaintiffs, stated claims under 42 U.S.C. § 1982 and, even though it had not then been specifically pleaded, under 42 U.S.C. § 1983. In dicta, our court further observed that:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officals conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation. [citations omitted]
>
> This view does not conflict with *Palmer, supra,* which noted that "no ease in this Court has held that a legislative act may violate equal protection *solely* because of the motivations of the men who voted for it." 403 U.S. at 224, 91 S.Ct. at 1944, 29 L.Ed.2d at 444 (emphasis supplied). [citations omitted]
>
> In *Palmer,* the closings left whites and blacks alike without municipal pools; consequently, there was "no state action affecting blacks differently from whites." 403 U.S. at 225, 91 S.Ct. at 1945, 29 L.Ed.2d at 445. According to the instant complaint allegations, the closing of West Drive left certain white residents with privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street.

535 F.2d at 979-80.

Upon remand, amendments to the complaint were filed, certain additional individuals moved and were permitted to intervene as plaintiffs and the court certified this as a class action.[4] Thereafter a bench trial was conducted on the merits before the district judge who on June 21, 1978, entered a judgment in favor of the defendants on all remaining issues. In doing so, the judge obviously deemed himself confined to the rationale expressed in the dicta of our earlier opinion of reversal. Thus, his primary focus was on that proof which showed what action was taken by the City of Memphis on petitions filed from time to time by private citizens, white and black, to close streets and alleys within the city. In this respect the court observed that

> the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents

---

4. The class was certified in accordance with a stipulation filed by the parties. That stipulation, in part, provided:

> 1. That the civil action brought by the plaintiff-intervenors through their complaint for intervention, as amended, may be certified as a class action that meets the requirements of Federal Rules of Civil Procedure 23(a) and (b)(2).
>
> 2. That the class is composed of black persons in the City of Memphis who own or stand to inherit property surrounding and adjoining the area along West Drive and Hein Park Subdivision.
>
> 3. That the issues embraced by this class action are to be confined to those in which injunctive or declaratory relief predominate.
>
> 4. That the monetary damage claims contained in the complaint, as amended, are made on behalf of the individual plaintiff-intervenors, and are not to be included as part of the relief sought on behalf of the members of the 23(b)(2) class, but said exclusion is not to preclude the seeking of such relief in other proceedings.

> and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens.

The court, however, did hold that the proposed closing had a disproportionate impact upon the black citizens, but that the disparate impact was not so stark that a discriminatory motive could be inferred therefrom. The court stated that

> the closure of West Drive in the manner adopted by the City Council will have disproportionate impact on certain black citizens. However, the Court also concludes that there is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation.
>
> * * *
>
> As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbond on return.
>
> However, this Court does not believe that the disparate impact is so stark that a purpose or intent of racial discrimination may be inferred. It must be noted that excessive traffic in any residential neighborhood has public welfare factors such as safety, noise, and litter, regardless of the race of the traffic and the neighborhood.
>
> * * *

> Similarly this Court does not find a purpose or intent to racially discriminate based upon a consideration of other evidence in the case as directed in *Arlington Heights v. Metropolitan Housing Corp., supra,* 429 U.S. [252] at 267, 68 [97 S.Ct. 555, 50 L.Ed.2d 450].

While ruling against the plaintiffs, the district judge nonetheless entertained serious reservations concerning the wisdom of the proposed closing. His opinion further stated:

> In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits even though the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the black citizens north of Hein Park, the aggravation of racial hostility with the attendent (sic) retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and the inconvenience and delay to Sanitation Department employees.

The trial judge's observations were supported by the record. Besides the evidence previously described, included in the evidence before the court were the petitions circulated by the Shankman Hill Civic Club and signed by several hundred citizens residing immediately to the north of West Drive. Those petitions took note that "[t]his Closing Symbolizes in unmistakable terms a White neighborhood shutting its door on its adjacent Black and integrated Communities." In a colloquy with counsel for the city, the trial judge indicated his concern:

> THE COURT: (Interjecting) There is proof that this is just an invitation to vandalism and to defiance and confrontation from the people. Obviously the black people north of there who are being told to stay out of the subdivision.

Further showing his extreme skepticism at the proposed closing, the trial court observed:

> THE COURT: I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years; the Hein Park Civic Club. They tried to keep all of the people north of Jackson from coming through there and that didn't work. So, now somebody; I don't know who it was, has come up with this clever idea that if we can get the two people on the corner to—I would be interested to know who is going to pay the eight hundred dollars [the agreed price of the 25-foot strip across West Drive]. If we get those two people to agree and lend us their names, we can stop these people to the north.[5]

---

5. The following exchange also occurred:

THE COURT: I don't think that you can compare the closing of a part of an alley in an all black neighborhood to a situation where an all white neighborhood is seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street.

MR. SPEROS: Well, Your Honor, there has been no proof that it is an overwhelmingly black neighborhood to the north.

THE COURT: Have you been out there?

MR. SPEROS: I used to live out there.

THE COURT: Used to, you don't now?

MR. SPEROS: Well, Sir, I lived on Overton Park which is just south of there just—

THE COURT: (Interjecting) I'm talking about Springdale. Coming across there. You don't think that is predominently (sic) black?

MR. SPEROS: I am saying that there was no proof introduced to that effect. Your Honor. If you want to take judicial notice of it.

THE COURT: I will take judicial notice of the fact that that is one of the areas that—we use the word "predominently" (sic). I am sure that it is not all black. Predominently (sic) is kind of a delicate word. Hein Park is not predominently (sic) white, it is white.

So, if the City Council didn't know that that property coming up to Jackson Avenue was predominently (sic) black, then I have got my doubts about them.

No contrary claim has been made on appeal, nor did any party object to the judicial notice so taken.

The trial judge also particularly noted in his opinion the testimony of Dr. Marvin Feit, an Assistant Professor at the University of Tennessee Center of Health Sciences, who testified as an expert witness that "closing West Drive would result in negative consequences in the form of hostility toward the people who live in Hein Park, increased vandalism, school harassment, and increased arrests by police."[6] The trial judge additionally relied in his findings

---

6. Dr. Feit further testified:

There are several things that I think could very easily happen. First, one of the most important things that I think will occur is an increase in hostility directed towards the people in Hein Park. Acts of vandalism will most likely increase in the community where if people, children and teenagers know and perceive that the people in Hein Park are receiving something of a personal benefit that other people are not physically able to get.

A second consequence is going to be in school and which I think there very easily will be increased harrassment [sic] on the part of the children in the community that attend Snowden School and maybe a couple of other places, to the extent that the school, and the street, which now has a reasonable degree of integration and a reasonable degree of harmony flowing between the two areas, will effectively be destroyed.

Q Which street are you talking about now?

A The harmony that exists between Hein Park and West Drive and the Vollentine area. That harmony will be effectively destroyed.

That barrier will not in any way decrease foot traffic. In fact, it may serve as a magnet to bring more people to that place. I think if you ever wanted to create a monument to increased hostility, you would do that and that would serve as a magnet to bring people to a street to demonstrate very clearly that that is evidence of people being able to get favortism. And as a result, and I have seen this happen in many other cities, you do get an increase and a long-term increase of vandalism on the street and the area, particularly in Hein Park.

Q So that you are not restricted—well let me ask the question this way. I think your testimony indicates that the hostility would be directed towards the residents of West Drive; is that correct?

A Very easily.

(Continued on following page)

upon the testimony of plaintiff's witness, Harold Moore, a licensed real estate broker, to the effect that the proposed closing would be a real benefit to the residents on West Drive. It is significant, however, that while Moore opined in his original testimony that because of the closing "there would not be a lessening of value in those properties in the Springdale area," his testimony shortly thereafter modified that view considerably:

> In my opinion, with the 17 years experience in the real estate industry, psychologically it [the street closing], would have a deterring, depressing effect on those individuals who might live north of the Hein Park area. With the closure of the street, the creation of another little haven, the fact that these people are in a lower economic social group and wouldn't be able to actually afford housing with the illustrious price tags of those houses in the Hein Park area, it would be, in my opinion, like the individual looking in the pastry store who doesn't have a dime and who can't afford it. And consequently, as a result of such, their moralistic values on their properties could tend to be such that the up-

---

Footnote continued—

> Q What, if anything, Dr. Feit, would this exertion of hostility have on the Black persons north of that area?
>
> A Well, normally what happens is that people get on the telephone and call the Police Department. This is going to result in increased cost to the people of the city of Memphis because more policemen are going to have to come over there and investigate and as a result they will spend more time in the Black community. Obviously it is going to probably bring about an increase in arrests and harrassment [sic] of more Black youths, not in any way helping the City of Memphis Police Department do its job dealing with crime. They will have to spend increasingly more time in the Black community to locate vandals as opposed to dealing with crime.
>
> * * *
>
> . . . I think that the barrier is going to serve as a monument to racial hostility because now more people have access between the Vollentine area and Hein Park.

keep would not be nearly so great and it could have a detrimental effect on the property values in the future.

The foregoing citations from the record can only be reconciled with the court's ultimate decision by concluding that the judge believed himself limited in his inquiry on remand to determining whether the proofs showed that in closing West Drive to reduce noise and traffic, the City of Memphis had conferred upon the white residents of West Drive a benefit that it had refused to black citizens when they had applied for similar relief. If this was, in fact, the limit of the inquiry, the decision must be upheld, for indeed the record did not show that any black resident had ever sought to close a street primarily for purposes of reducing the traffic and contributing to the tranquility of a given neighborhood. We have considerable sympathy with the trial judge's view of his responsibility on remand since it seems supported at least by the cited dicta of our opinion. We do not conceive, however, that this was ever the full intent of our earlier decision, and it seems equally clear that the plaintiffs themselves never abandoned their effort to seek relief on a broader basis. Plaintiffs' posture in their pleadings and throughout the trial was consistent with the closing argument of their counsel:

> Going back to *1982*, which refers to the rights of blacks to hold their property in the same manner as whites, we feel that the closing of West Drive and the enhancement of the value of the properties along West Drive and the attendant and simultaneous decrease in property values that we think we have established here by the testimony of our witnesses in the black neighborhood does deny them a right protected by Section 1982. If the right is to uphold your property, we think that that right has been deprived. Not necessarily from the comparative standpoint of have black citizens ever

applied for a street to be closed of this size and didn't get it, and then just close off the inquiry there.

Now we understand the parameters of the Sixth Circuit's decision in this, but we would suggest that the interpretations of *1982* refer to the full panacean [sic: panoply] of property rights, not necessarily the transfer of property.

Now, we also ask this Court in reviewing this matter be mindful of the Supreme Court's starting point and its instruction of how a case of this nature should be considered. We think that the key language; and I think this is of supreme importance here, the key language is that the Court has to conduct a sensitive inquiry. It would be our argument and it is our argument that a sensitive inquiry in a matter of this type where we are contending that there was racial motivation, racial impact entails taking in everything that was brought forth here.

The "sensitive inquiry" referred to by counsel for the plaintiffs was taken from language of the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). There the Supreme Court was faced with the question of whether the refusal of the Village of Arlington Heights to authorize the construction of a public housing project within its boundaries in suburban Chicago was racially discriminatory and violated the Fourteenth Amendment. As Mr. Justice Powell observed:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another," *Washington v. Davis, supra,* 426 U.S.

> [229] at 242 [96 S.Ct. 2040, 48 L.Ed.2d 597]—may provide an important staring point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins,* 118 U.S. 356 [65 S.Ct. 1064, 30 L.Ed. 220] (1886); *Guinn v. United States,* 238 U.S. 347 [35 S.Ct. 926, 59 L.Ed. 1340] (1915); *Lane v. Wilson,* 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281] (1939); *Gomillion v. Lightfoot,* 364 U.S. 339 [81 S.Ct. 125, 5 L.Ed.2d 110] (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact alone is not determinative, and the Court must look to other evidence.

Id. at 266, 97 S.Ct. at 564 (footnotes omitted).[7]

---

7. Mr. Justice Powell was referring here to *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), and its holding that the petitioners were illegally imprisoned for failure to comply with a city ordinance where such failure was the result of the city's refusal to consent to the petition of approximately 200 persons of Chinese ancestry to operate a laundry business while the same consent was granted 80 others who were not of Chinese descent. The Court held that this worked an impermissible denial of the equal protection of the laws and hence a violation of the Fourteenth Amendment, even where no express evidence of intent was found. In this regard the Court found the facts themselves sufficient:

> The fact of this discrimination is admitted. No reason for it is shown and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the Fourteenth Amendment of the Constitution. *Id.* at 374, 6 S.Ct. at 1073.

In *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), also cited by Mr. Justice Powell, the Supreme Court stuck down a local act of the Alabama legislature which rede-

(Continued on following page)

[1] While in his opinion, the trial judge expressly indicated his awareness of *Arlington Heights, supra,* we believe that he conceived himself limited in his capability to grant relief by the language in *Greene I* and that he placed too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment. In short, we conclude that, upon his own findings and upon the proof credited by him, the pattern of discrimination here was indeed "stark" and was in a very real sense a badge of slavery violative of plaintiffs' rights under the Thirteenth Amendment and subject to relief under 42 U.S.C. § 1982.[8]

We readily acknowledge that, as a general proposition street closings are a matter of purely local concern. We also recognize that street closings may, indeed, be a very beneficial way of preserving the residential character of a neighborhood against the growing incursion of traffic from outside sources. Thus we take note of plaintiff's reliance upon *Arlington County Board v. Richards,* 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977), and the Court's observation that:

Footnote continued—

fined the boundaries of the City of Tuskegee with the effect of removing from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. As Mr. Justice Frankfurter observed:

> The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia,* the right to vote in municipal elections. *Id.* at 341, 81 S.Ct. at 127.

8. Because of our holding that the plaintiffs are entitled to relief under Section 1982, we do not reach the question whether relief could be predicated directly on the Thirteenth Amendment with the cause of action lying under Section 1983. Neither our circuit nor the Supreme Court has decided this question. We note, however, that constitutional rights other than those contained in the Fourteenth Amendment have been protected under Section 1983. *See, e.g., Lane v. Wilson,* 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) (violation of Fifteenth Amendment remedied under R.S. § 1979, the predecessor of Section 1983).

> A community may also decide that restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing noise, traffic hazards, and litter.

Id. at 7, 98 S.Ct. at 26.

[2] We further recognize that not every racially discriminatory act constitutes a badge of slavery. *See e. g., Civil Rights Cases,* 109 U.S. 3, 24-25, 3 S.Ct. 18, 27 L.Ed. 835 (1883). *Cf. Runyon v. McCrary,* 427 U.S. 160, 211, 96 S.Ct. 2586, 2614, 49 L.Ed.2d 415 (1976) (White, J., dissenting) ("A racially motivated refusal to hire a Negro or a white babysitter or to admit a Negro or a white to a private association cannot be called a badge of slavery . . ."). Nonetheless, the Supreme Court "recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its 'burden and disabilities'—included restraints upon 'those fundamental rights which are the essence of civil freedom . . .'" *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 441, 88 S.Ct. 2186, 2204, 20 L.Ed.2d 1189 (quoting *Civil Rights Cases, supra,* 109 U.S. at 22, 3 S.Ct. 18).[9]

We are convinced that the erection of the physical barrier between a historically all-white residential neighborhood and a predominantly black neighborhood under

---

9. Senator Trumbull, the sponsor of the bill which ultimately became the Civil Rights Act of 1866, stated that

> this measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect . . . . Of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slave-holding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?
>
> It is the intention of this bill to secure those rights.

36 Cong. Globe 474 (1866).

the particular circumstances found by the court here is precisely the type of "badge" which was the target of the Thirteenth Amendment and of Section 1982.[10] The broad reach of Section 1982 was repeatedly emphasized by Mr. Justice Stewart in *Jones, supra,* 392 U.S. at 422-37, 88 S.Ct. 2186. As the Supreme Court later observed in *Sullivan v. Little Hunting Park, Ins.,* 396 U.S. 229, 237, 90 S.Ct. 400, 404, 24 L.Ed.2d 386 (1969), "[a] narrow construction of the language of § 1982 would be inconsistent with the broad and sweeping nature of the protection meant to be afforded by [the Act]."

42 U.S.C. § 1982 was enacted under authority of Section 2 of the Thirteenth Amendment.[11] *Jones, supra,* 392 U.S. at 413, 88 S.Ct. 2186. Congress therein determined that the disability of blacks to enjoy property in the same manner as whites was a badge and incident of slavery. *Id.* at 439, 88 S.Ct. 2186.[12]

---

10. We also note that Section 1982 is limited in its scope to situations having a racial character. "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *George v. Rachel,* 384 U.S. 780, 791, 86 S.Ct. 1783, 1789, 16 L.Ed.2d 925 (1966).

11. 42 U.S.C. § 1982, in its original form, was enacted as part of the Civil Rights Act of 1866. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, re-enacted by the Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 144, and codified in § 1978 of the Revised Statutes of 1874, now 42 U.S.C. § 1982.

12. Mr. Justice Bradley in the *Civil Rights Cases, supra,* 109 U.S. at 20, 3 S.Ct. at 28, stated regarding the Thirteenth Amendment:

> By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that

(Continued on following page)

While the Supreme Court has not often been required to define "badge of slavery" under the Thirteenth Amendment, it is clear that many badges of slavery either were a part of the recent past or remain a part of the present. As Mr. Justice Douglas stated:

> Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting, *e. g., Lane v. Wilson,* 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281]. Negroes have been excluded over and again from juries solely on acount of their race, *e. g., Strauder v. West Virginia,* 100 U.S. 303 [, 25 L.Ed. 664], or have been forced to sit in segregated seats in courtrooms, *Johnson v. Virginia,* 373 U.S. 61 [83 S.Ct. 1053, 10 L.Ed.2d 195]. They have been made to attend segregated and inferior schools, *e. g., Brown v. Board of Education,* 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873], or been denied entrance to colleges or graduate schools because of their color, *e. g., Pennsylvania v. Board of Trusts,* 353 U.S. 230 [77 S.Ct. 806, 1 L.Ed.2d 792]; *Sweatt v. Painter,* 339

Footnote continued—

slavery or involuntary servitude shall not exist in any part of the United States.

It is true that slavery cannot exist without law any more than property in lands and goods can exist without law, and therefore the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States;

U.S. 629 [70 S.Ct. 848, 94 L.Ed. 1114]. Negroes have been prosecuted for marrying whites, *e. g., Loving v. Virginia,* 388 U.S. 1 [87 S.Ct. 1817, 18 L.Ed.2d 1010]. They have been forced to live in segregated residential districts, *Buchanan v. Warley,* 245 U.S. 60 [38 S.Ct. 16, 62 L.Ed. 149], and residents of white neighborhoods have denied them entrance, *e. g., Shelley v. Kraemer,* 334 U.S. 1 [, 68 S.Ct. 836, 92 L.Ed. 1161]. Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches, *Plessy v. Ferguson,* 163 U.S. 537 [16 S.Ct. 1138, 41 L.Ed. 256]; public parks, *New Orleans Park Improvement Assn. v. Detiege,* 358 U.S. 54 [79 S.Ct. 99, 3 L.Ed.2d 46]; restaurants, *Lombard v. Louisiana,* 373 U.S. 267 [, 83 S.Ct. 1122, 10 L.Ed.2d 338]; public beaches, *Mayor of Baltimore v. Dawson,* 350 U.S. 877 [76 S.Ct. 133, 100 L.Ed. 774]; municipal golf courses, *Holmes v. City of Atlanta,* 350 U.S. 879 [76 S.Ct. 141, 100 L.Ed. 776]; amusement parks, *Griffin v. Maryland,* 378 U.S. 130 [84 S.Ct. 1770, 12 L.Ed.2d 754]; buses, *Gayle v. Browder,* 352 U.S. 903 [77 S.Ct. 145, 1 L.Ed.2d 114]; public libraries, *Brown v. Louisiana,* 383 U.S. 131 [86 S.Ct. 719, 15 L.Ed.2d 637]. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton." *Hamilton v. Alabama,* 376 U.S. 650 [84 S.Ct. 982, 11 L.Ed.2d 979].

Jones, supra, 392 U.S. at 445-46, 88 S.Ct. at 2206 (concurring opinion).

The closing of West Drive is merely another device leading to the same result. It would be, to blacks and whites alike, exactly what the trial judge said it was: an

unmistakable warning to the black people living to the north of West Drive to stay out of the Hein Park subdivision. "[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." *Jones, supra,* 392 U.S. at 442-43, 88 S.Ct. at 2205.

Without endeavoring to establish any legal guidelines for the determination of when conduct may amount to a badge of slavery, we find the determinations made by the district court here to be altogether adequate to bring the conduct complained of within that description. The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black. The barrier was to be erected precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them. The proposed closing was not enacted in response to any uniform city planning effort, directed generally to the preservation of the residential neighborhoods throughout the city; instead it appears to have been a unique step to protect one neighborhood from outside influences which the residents considered to be "undesirable." Finally, there was some evidence, credited by the district court, of an economic depreciation in the property values in the predominantly black residential area with a corresponding increase in the property values in Hein Park. The result, under the unique circumstances here, can only be seen as one more of the many humiliations which society has historically visited upon blacks. Where that racial humiliation not only rises to the level of a badge of slavery but also affects the right of blacks to hold property in the same manner as other citizens, then Section 1982 has been

violated and the feedral courts must provide a suitable remedy.[13]

OTHER ISSUES

In addition to their Sections 1982 and 1983 claims, the plaintiffs raised certain pendent state claims. The district court held that "the evidence does not support a recovery under these or any other theory under the law of Tennessee." The appellants have not questioned that decision in this appeal; we therefore have not considered it. The plaintiffs also sought a decree that the defendants should be required to cause sidewalks, curbs and gutters to be installed on West Drive. The district court found no basis for such relief and we agree. We likewise agree with the district court's decision that the plaintiffs failed to prove their claim of a violation of their rights to procedural due process under the Fifth and Fourteenth Amendments.

CONCLUSION

In conclusion we hold that under the unique circumstances shown here, the erection of the barrier at the northerly boundary of West Drive constitutes a badge of slavery adversely affecting the ability of the plaintiffs to hold and enjoy their property, in violation of their

---

13. We expressly leave open here the question to what extent intent is ever an element of the plaintiff's case under Section 1982. *Compare* Note, *Racially Disproportionate Impact of Facially Neutral Practices—What Approach under 42 U.S.C. Sections 1981 and 1982?*, 1977 Duke L.J. 1267 *with* Comments, *Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Acts of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose?*, 1978 B.Y.U.L.Rev. 1030. Cf. *County of Los Angeles v. Davis*, 440 U.S. 625, 99 S.Ct. 1379, 1386, 59 L.Ed.2d 642 (1979) (Powell, J., dissenting) (whether case brought under 42 U.S.C. § 1981 requires proof of racially discriminatory intent or purpose is an open question).

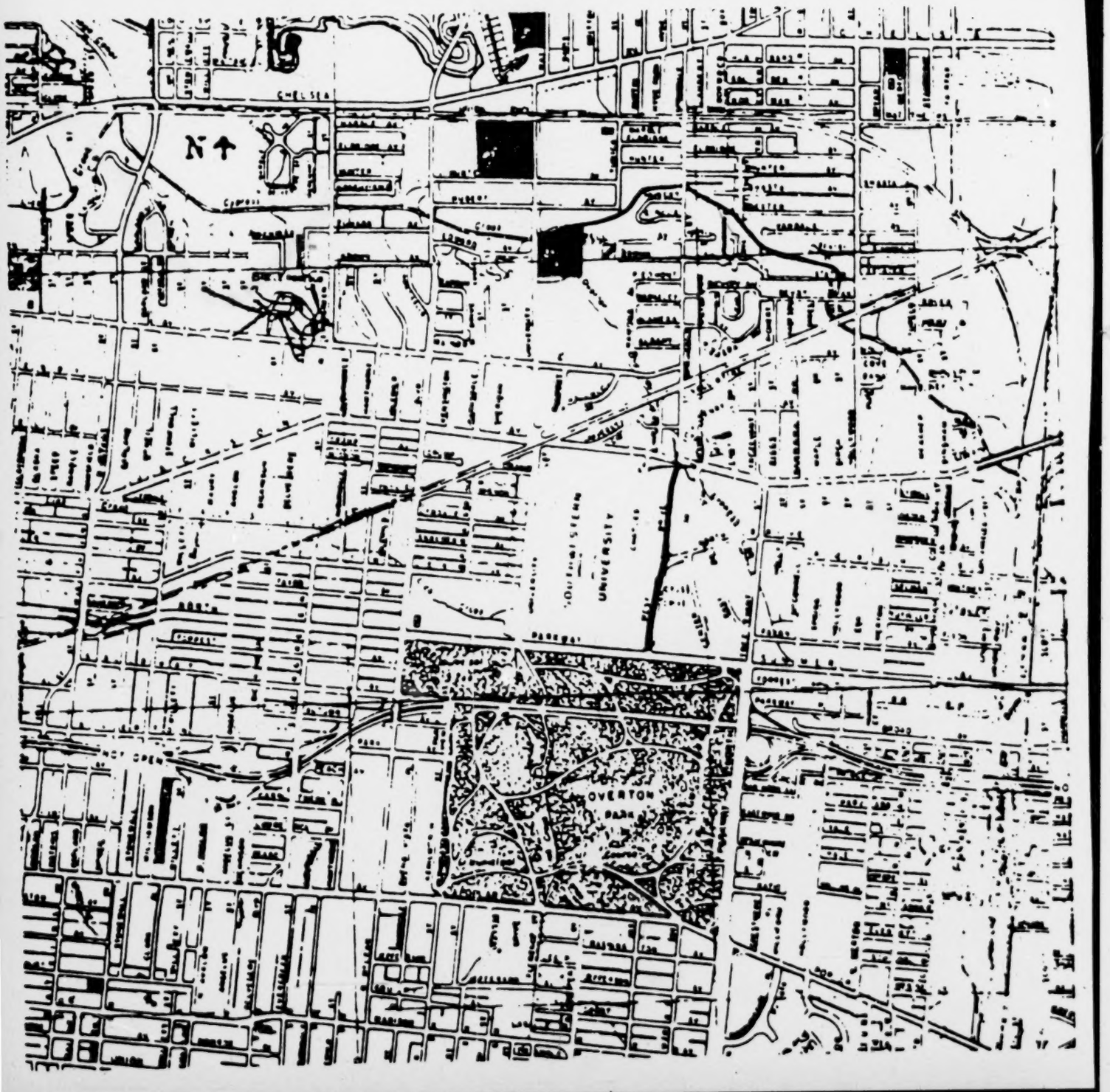
rights under the Thirteenth Amendment and entitling them to a remedy under Section 1982.[14] Accordingly, the judgment of the district court is reversed and the cause remanded for the fashioning of appropriate injunctive relief.

Appendix A to follow.

---

14. "The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equtable remedy." *Jones, supra,* 392 U.S. at 414 n. 13, 88 S.Ct. at 2190 n. 13.

APPENDIX A



CELEBREZZE, Circuit Judge, dissenting.

I must respectfully dissent because I am convinced that the majority has erred in several important respects. First, I do not believe that 42 U.S.C. § 1982 is violated by a municipality's exercise of its police powers to close a street when race is not a factor in that decision. The closing of West Drive here does not deprive black citizens of their right to hold property free from racial discrimination in the same manner as white citizens. The majority's extension of § 1982 so as to proscribe the closing of West Drive expands the scope of the statute to an unprecedented extreme and conflicts with the well-established policy of judicial deference to legislative judgment in land use regulation. Indeed, today's decision illustrates the need for a limiting principle for claims arising under § 1982. To this end I would require a showing of discriminatory intent or purpose to establish a violation of § 1982.

Second, the proper focus of this litigation, as recognized by the district court, is whether a racial minority would be denied the equal protection of the laws by the proposed street closing. I believe the district court was correct in finding that the plaintiffs had failed to demonstrate the discriminatory intent necessary to establish a violation of the equal protection clause of the fourteenth amendment. I would accordingly affirm the judgment of the district court.

I

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186 (1968), the Supreme Court held that the enabling clause of the thirteenth amendment vests Congress with the power to identify "badges of slavery" and pass remedial legislation "necessary and proper" to eliminate them. *Id.* at 439-40, 88 S.Ct. 2186. In enacting 42 U.S.C. § 1982

Congress found discrimination against blacks in the sale and rental of property to constitute such a "badge of slavery" prohibited by the thirteenth amendment. *Id.* at 440-41, 88 S.Ct. 2186 § 1982 accordingly outlaws all racial discrimination, public and private, in the sale, rental, or holding of real property.

The majority's focus in this litigation is whether the right of black citizens residing north of Hein Park to "hold" their property in the same manner as white citizens residing in Hein Park would be violated by the erection of a traffic barrier on a street connecting the two neighborhoods. The majority concludes that the construction of the barrier will adversely affect black property owners north of Hein Park while at the same time benefiting white residents in Hein Park. In this disparate impact the majority discerns a violation § 1982 and the thirteenth amendment.

It is true that the scope of § 1982 is exceptionally broad, reaching all public and private discrimination in activity affecting real and personal property. *Jones,* 392 U.S. at 437-39, 88 S.Ct. 2186. The statute's proscription of racial discrimination against a citizen "holding" real property does not, however, preclude the legitimate exercise of a municipality's police powers. Where, as here, a municipality exercises those powers in a rational manner to achieve permissible goals,[1] absent evidence of racial motivation or intent, the right to "hold" property in the manner secured by § 1982 is not violated.

---

1. The stated objectives of the application to close West Drive were: 1) to reduce the flow of traffic; 2) to enhance safety for children who walk to school; and 3) to reduce traffic pollution in the residential area such as noise and litter. The legitimacy of these goals is well established. *See Arlington County Board v. Richards,* 434 U.S. 5, 7, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977).

The right to "hold" property is the right to maintain possession while enjoying the privileges and benefits which ownership or occupancy entails in a manner untainted by racial discrimination. That right does not include an inviolate license of universal street access. Rather, street access, falling as it does within the category of land use, is a subject exclusively within the legislative province and subject to regulation in the public interest.[2] There is no requirement that legislative decisions regarding land use affect all persons equally. By definition, a street closing will not result in an identical impact upon residents and non-residents.

The closing of West Drive would have a disproportionate impact both racial and geographical in nature. As a result of racial residential segregation in the area, the black neighborhood north of Hein Park will no longer have access to West Drive, while the white Hein Park neighborhood will enjoy the increased solitude and safety accruing from a decrease in traffic. While distinctions based on race are inherently suspect, distinctions between residents and non-residents of a local neighborhood are not invidious. *Arlington County Board v. Richards,* 434 U.S. 5, 7, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977).

In light of the deference accorded legislative judgments in matters of land use regulation,[3] and because the district court's finding of an absence of racial motivation is supported by the record, the proposal to close West

---

2. Although matters of land use are within a municipality's police powers, the wide latitude in classifying and limiting property uses is always "[s]ubject to specified constitutional limitations." *Berman v. Parker,* 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

3. *See Arlington County Board v. Richards,* 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Drive must be viewed as creating a distinction based upon residency, not upon race. Since distinctions between residents and non-residents are permissible, without proof of racial motivation or intent I cannot conclude that the racially disproportionate impact here is sufficient circumstantial proof of the racial discrimination outlawed by § 1982.

Indeed, today's decision represents an unfortunate overreading of section 1982. The majority's willingness to characterize the proposed street closing as a violation of § 1982 demonstrates the need for a limiting principle for actions brought under this section. The section 1982 screening mechanism, as in actions proceeding directly under the fourteenth amendment, should be a requirement of a showing of discriminatory intent.

Although the district court did not analyze the case under § 1982 and the thirteenth amendment, the majority faults the district judge for placing "too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment." The district court, however, did no more than follow the directions issued by this court in remanding the case:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; *he must prove racial motivation, intent or purpose,* in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation.

Greene v. City of Memphis, 535 F.2d 976, 979 (6th Cir. 1976) (emphasis added).

The majority dismisses this instruction as dictum and does not address the question of whether cases brought

under § 1982—like cases brought directly under the fourteenth amendment—always require proof of discriminatory intent. I believe that we are required to follow the explicit instructions of our prior decision regarding the components of a § 1982 claim, and would therefore require a showing of discriminatory intent to establish a violation of section 1982.

Interpreting section 1982 to require discriminatory intent is consistent with the Supreme Court's admonition in *Jones* that Congress intended section 1 of the Civil Rights Act of 1866—the source of § 1982—"to prohibit *all racially motivated* deprivations of the rights enumerated in the statute . . . ." 392 U.S. at 426, 88 S.Ct. at 2196 (emphasis added). Section 2 of the 1866 Act reinforces the requirement of racial intent by imposing sanctions upon anyone who, under color of law, deprives another of the rights protected by section 1 "by reason of his color or race." 14 Stat. 27.

The legislative history of § 1982 also indicates that it should parallel the fourteenth amendment's standard of proof. Although the 1866 Act, the forerunner of § 1982, is generally regarded as a "Thirteenth Amendment statute," *see Jones*, 392 U.S. at 422, 437-38, 88 S.Ct. 2186, it has also been found to rely on the fourteenth amendment. The fourteenth amendment was enacted, in part, to eliminate doubts about the constitutionality of the 1866 Act. *Id.* at 436, 88 S.Ct. 2186. It is not unreasonable to conclude that the standards for establishing a prima facie case of discrimination under § 1982 and the equal protection clause of the fourteenth amendment should be the case: there must be proof of discriminatory intent.

Finally, an observation made by the Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), is relevant here. The court was con-

cerned about the problems that could be generated if the fourteenth amendment was violated by a mere showing of disparate racial impact:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

426 U.S. at 248, 96 S.St. at 2051-2052 (footnote omitted).

Section 1982, extending as it does to the expansive realm of both public and private action involving property, might well precipitate many of these same consequences if proof of discriminatory intent is not required. For these reasons, I cannot agree that the facts and circumstances of this case establish a violation of 42 U.S.C. § 1982.

II

The district court based its decision in favor of the City of Memphis on the plaintiffs' failure to establish the requirements of a prima facie case under the equal protection clause of the fourteenth amendment. The district court found that the closing of West Drive would have a "disproportionate impact on certain black citizens," but

there was not "sufficient proof or racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation." Moreover, the district court did not believe that the disparate impact was so stark that an intent of racial discrimination could be inferred. I conclude that the district court's findings of fact and conclusions of law are neither clearly erroneous, F.R. Civ.P. 52(a), nor incorrect as a matter of law.

Recent Supreme Court decisions mandate that to establish that a governmental defendant has deprived plaintiffs of constitutional rights guaranteed by the fourteenth amendment, something more than a disproportionate discriminatory impact must be shown. Proof of a racially discriminatory intent or purpose is also required to show a violation of the equal protection clause. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis,* 426 U.S. 229, 239-45, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The recent opinion of *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), provides a functional definition of "intent":

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. *See United Jewish Organizations v. Carey,* 430 U.S. 144, 179 [, 97 S.Ct. 996, 51 L.Ed.2d 229] (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. 442 at 279, 99 S.Ct. at 2296 (footnote omitted).

Applying the Supreme Court's elaboration in *Feeney* of the *Washington v. Davis* and *Arlington Heights* impact-

plus test, the district's court's conclusions are, if anything, reinforced. The record contains not even a scintilla of evidence indicating that the Memphis City Council approved the proposal to close West Drive "because of" the adverse effects the black citizens north of Hein Park might experience.

The absence of evidence of discriminatory intent does not, however, signal the end of the inquiry. Under the applicable *Arlington Heights* criteria, "invidious discriminatory purpose" can be inferred or detected through an inquiry which weighs a number of factors. Proof of discriminatory intent does not pose an insurmountable obstacle because *Arlington Heights* liberalized the probative value of various kinds of circumstantial evidence relevant in an inquiry into motive.

The first *Arlington Heights* factor—disparate impact—is present here. As I indicated, the disparate impact of the closing of West Drive is both racial and geographical in nature. I believe that the district court was correct in concluding that this disparity does not constitute a stark pattern of discrimination from which racial intent can be inferred. It is clear that disparate impact, standing alone, will only infrequently suffice to establish an equal protection violation. *Washington v. Davis,* 426 U.S. at 242, 96 S.Ct. 2040; *Arlington Heights,* 429 U.S. at 265-66, 97 S.Ct. 555. Absent a stark pattern of discrimination from which intent may be inferred, further inquiry is necessary.

The second evidentiary source bearing on intent is the historical background of the decision. Particularly relevant here would be a "series of official actions taken for invidious purposes." *Arlington Heights,* 429 U.S. at 267, 97 S.Ct. at 564. Upon careful examination, the background of the decision to close West Drive appears untainted by any invidious action. The legislative machinery was set

in motion by the submission of an appropriate application to the Planning Commission. The Commission processed the application and in time, the City Council voted to approve the closing. In sum, the "background" of this decision fails to reveal racial intent. And the same result is reached in considering the third factor specified in *Arlington Heights*—the specific sequence of events leading to the challenged decision.

The district Court's opinion does not record any instances of departures from normal procedural sequences or any "substantive" departures from normal decisionmaking (the fourth and fifth *Arlington Heights* factors). To the contrary, the decision to approve the closing of West Drive is consistent with the approvals granted other applications to close streets and alleys. It is true that the West Drive application is the first attempt to close a street in the nature of West Drive. Yet I cannot subscribe to the view that the initial attempt to utilize procedures prescribed by law for closing a street, without more, constitutes circumstantial proof of racial bias.

Where, as here, the applicable *Arlington Heights* "evidentiary sources" for a gleaning of official intent fail to reveal direct and circumstantial proof of discriminatory intent, an inference of invidious purpose cannot be drawn. I do not find from the record before me that in closing the street the City infringed upon constitutional rights, nor do I find that the City acted with malice or intent to discriminate because of race. Therefore, I would affirm the district court's decision that the fourteenth amendment has not been violated.

(Filed December 11, 1979)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

78-1527

N. T. GREENE,
Plaintiff-Appellant,

and

EDWIN OWENS, et al.,
Plaintiffs-Intervenors-Appellants,

vs.

CITY OF MEMPHIS, et al.,
Defendants-Appellees.

ORDER

Before: CELEBREZZE, ENGEL and KEITH, Circuit Judges

Defendants-Appellees have filed herein a petition for rehearing with a suggestion that the petition be heard by the court sitting en banc. Less than a majority of the judges of this court who are in regular active service of this court having favored rehearing en banc, the petition was referred to the panel to whom the appeal was originally assigned. Upon consideration, it appearing that the petition presents no issues which have not already been fully considered by the court.

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

Judge Celebrezze would grant the rehearing for the reasons set forth in his dissenting opinion previously filed.

Entered by Order of the Court
/s/ John P. Hehman
Clerk

(Filed January 18, 1980)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1527

N. T. GREENE,
Plaintiff-Appellant,

vs.

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS AND EDWIN McBRAYER,
Defendants-Appellees.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by Order of the Court
/s/ John P. Hehman
John P. Hehman, Clerk

(Filed January 18, 1980)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1528

N. T. GREENE,
Plaintiff,

ELNORA PRIEST CROSS, DEWIN OWENS AND
CAROLYN BURSE,
Intervenors-Appellants,

vs.

CITY OF MEMPHIS, WYETH CHANDLER, THE
COUNCIL OF THE CITY OF MEMPHIS
AND EDWIN McBRAYER,
Defendants-Appellees.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by Order of the Court
/s/ John P. Hehman
John P. Hehman, Clerk